Supreme Court, U. S.
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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

IN RE: JOSEPH RYAN RIGGS,
A Minor,
TOMMY JOE RIGGS and
ANN MARIE RIGGS,
Petitioners,

versus

ROBERT TERRAZAS,
Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF TENNESSEE, WESTERN SECTION

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals of Tennessee erred in refusing to give full faith and credit to a Georgia Final Order of Adoption involving an infant child on the basis that it was violative of the due process rights of the putative father in contravention of the public policy of Tennessee and the Constitution of the United States?

2. Whether the Court of Appeals of Tennessee erred in ruling that a putative father whose identity was unknown and legally undiscoverable by the Georgia Court which granted the adoption has "established, through his sperm and through his efforts to find his natural child, such a relationship with the child as to entitle him to due process of law in any proceedings adverse to his interest" and that any adoption decree rendered without such notice becomes voidable at his option?

3. Whether the Court of Appeals of Tennessee erred in failing to recognize the constitutional right of privacy of a birth mother who refused to disclose the identity of the putative father of her infant child whom she desired to surrender for adoption?

4. Whether the Court of Appeals of Tennessee erred in construing and applying retroactively *Caban v. Mohammed*, 441 U.S. 380 (1979), to a case involving an infant with whom the putative father had established no relationship?

5. Whether the Court of Appeals of Tennessee denied adoptive parents full recognition of their

liberty rights and due process rights under the Constitution of the United States when it ordered the removal of their child from their custody without any showing of their unfitness as parents?

6. Whether the Court of Appeals of Tennessee denied adoptive parents their right to procedural due process and equal protection of the laws under the Constitution of the United States when it ordered the removal of their child from their custody?

7. Whether the Court of Appeals of Tennessee denied the infant adoptive child his due process rights under the Constitution of the United States when in the course of litigation affecting his present and future custody, property rights, and legal relationships, it refused to appoint a guardian *ad litem* and refused to permit a full exploration of the issue of his custody?

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OPINIONS BELOW

The opinion of the Trial Court, filed on September 21, 1979, not reported, is reproduced as Appendix A. The opinion of the Court of Appeals of Tennessee, Western Section, filed on July 29, 1980, — Tenn. —, — S.W.2d —, (1980), not yet reported, is reproduced as Appendix B. The order of the Supreme Court of Tennessee denying Petitioners' Application for Permission to Appeal, filed on October 6, 1980, not yet reported, is reproduced as Appendix C.

JURISDICTION

The judgment of the Court of Appeals of Tennessee, Western Section, was entered on July 29, 1980. Application for Permission to Appeal was denied by the Supreme Court of Tennessee on October 6, 1980. This Petition for *Certiorari* is timely filed within ninety days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Article IV, Section 1, Constitution of the United States:

> Full Faith and Credit shall be given in each State to the public acts, records, and judicial proceedings of every other State. . . .

Amendment Fourteen, Constitution of the United States:

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 United States Code Section 1738:

> . . . Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law, or usage in the courts of such State, Territory or Possession from which they are taken.

28 United States Code Section 2403(b):

> In any action, suit, or proceeding in a court of the United States to which a State or any agency, officer, or employee thereof is not a party, wherein the constitutionality of any statute of that State affecting the public interest is drawn in question, the court shall certify such fact to the attorney general of the State, and shall permit the State to intervene for presentation of evidence, if evidence is otherwise admissible in the case, and for argument on the question of constitutionality. The State shall, subject to the applicable provisions of law, have all the rights of a party and be subject to all liabilities of a party as to court costs to the extent necessary for a proper presentation of the facts and law relating to the question of constitutionality.

Pertinent portions of the Georgia adoption statute, Georgia Code Chapter 74, are reproduced as Appendix D.

STATEMENT OF THE CASE

Joseph Ryan Riggs, age twenty-three months, has resided with Petitioners, his adoptive parents, since he was three days old. At the time of the placement and adoption, Petitioners, Tommy Joe Riggs and Ann Marie Riggs, were thirty-six and thirty-one years old, respectively, and had been married for eleven years.

Petitioners had resided in Modesto, California, for several years where they developed a friendship with their parish priest, Father Joseph Ryan. In October, 1978, Petitioners moved to Moultrie, Georgia, to accept different employment. In December, 1978,

Father Ryan phoned Petitioners and asked if they were interested in adopting a child yet to be born to an unwed mother whom he was counseling. After considering the matter for two days, Petitioners called Father Ryan to advise that they wished to adopt the child. They were later told that the expectant unmarried mother was residing in a convent in Nevada and that the child would be brought to them after its birth.

Petitioners then retained the services of an attorney in Moultrie, Colquitt County, Georgia, who thereafter handled all legal aspects of the adoption in full compliance with Georgia law. At no time did Petitioners have any contact with any biological relative of the child. Their attorney prepared the documents required by Georgia law, including a Surrender of Parental Rights Final Release for Adoption, Acknowledgement of Surrender of Parental Rights, and Mother's Affidavit Regarding Putative Father, and transmitted each of the documents to Nevada for signature. After the child was born, each of the documents was executed by the birth mother, Roneva Anderson, under what was later discovered to be an assumed name "Jessica Stewart."

The birth mother stated in her "Mother's Affidavit Regarding Putative Father" that the identity and location of the biological father of her child was "unknown" even though under Georgia law she had the right, if she so desired, to merely refuse to disclose his name and address.

On February 1, 1979, the three-day old infant was brought to Georgia by a nun and was left with Petitioners. Petitioners contributed two thousand

dollars to the convent to help defray the costs of the birth and reimbursed the nun's travel expenses.

Their attorney prepared the necessary Petition for Adoption and filed it with the Superior Court of Colquitt County on February 7, 1979.

The Superior Court set April 12, 1979, as the hearing date for the adoption petition. Pursuant to Georgia law, the Court ordered that a hearing be held on March 1, 1979, to determine whether notice to the putative father was required. After hearing evidence the Court found: that the identity and location of the putative father was unascertainable; and furthermore, that no putative father had ever lived with the child, contributed to the support of the child, or given any other tangible indication of interest in the child. The Court concluded that the putative father of said child was not entitled under Georgia law to notice of the adoption proceedings. In accordance with Georgia law, a home study was done by the Georgia Department of Human Resources and a report recommending the adoption was filed with the Court. On April 12, 1979, a Final Order of Adoption was entered and the child was given the legal name of Joseph Ryan Riggs. All aspects of the adoption were handled by Petitioners' Georgia attorney. Petitioners themselves did not learn the name of either the biological father or biological mother until the initiation of these proceedings against them by Respondent.

In March 1979, while the adoption was pending, Petitioner was approached by his former employer and offered a new position which would require relocation. Following the entry of the Final Order of

Adoption, Petitioners moved to Jackson, Tennessee.

After Petitioners had settled in their new home in Tennessee, Father Ryan telephoned informing them that he had been subpoenaed to appear in a judicial proceeding in California brought against the birth mother of their child by the alleged natural father. Petitioners received no formal notice of the California proceeding, nor were they formerly apprised of its outcome until they were served with the Petition for *habeas corpus* and arrested on an *ex parte Writ of Ne Exeat* issued by the Chancery Court of Madison County, Tennessee, on the evening of July 26, 1979. Terrified by the jailing, the prospect of forced separation from their child and the threat to the future security of their family unit, Petitioners immediately retained legal counsel.

At the outset of the hearing held in the Chancery Court of Madison County, Tennessee on August 7, 1979, Petitioners asserted that the sole issue to be decided at the *habeas corpus* hearing was the legality of Petitioners' holding of the child. They tendered into evidence as proof a certified and exemplified copy of their Georgia adoption proceedings including the Final Order of Adoption from the Superior Court of Colquitt County, Georgia. Petitioners contended that full faith and credit must be given to the Georgia adoption order which was valid and regular on its face. The Court overruled Petitioners' motions to restrict the scope of the *habeas corpus* hearing and allowed Respondent to relate, among other things, the following facts. Respondent, Robert Terrazas, a twenty-eight year old unmarried man, established a relationship with Roneva Anderson in California, in late 1977. Miss Anderson, an un-

married nineteen year old, became pregnant, and approximately two months later, in July of 1978, she informed Respondent she desired to have no further contact with him and that she intended to place the child for adoption. She confirmed this by letter dated September 9, 1978, which letter was the last communication Respondent had with Miss Anderson.

According to facts later developed by Respondent, Miss Anderson admitted her pregnancy to her family and with their support sought counsel from Father Ryan. In November or December, 1978, she asked Father Ryan if he knew of anyone who wanted to adopt her child. With Father Ryan's assistance, she traveled to Reno, Nevada, to a convent where she stayed until the child was born. On January 29, 1979, a male child was born to her.

Two months before the birth of the child, Respondent initiated legal proceedings in California seeking a restraining order preventing Miss Anderson from placing the child for adoption. However, the Complaint and Summons were not served upon Miss Anderson until February 25, 1979 — after the child had been born, surrendered to and physically transferred to Petitioners, said surrender had become irrevocable by its terms, and the adoption had been commenced in Georgia. After a hearing, a preliminary injunction was issued by the Superior Court of Calaveras County, California, on May 9, 1979, enjoining Miss Anderson from placing the child for adoption. However, the Preliminary Injunction was entered in California almost a month *after* the Final Order of Adoption was entered by the Georgia Court.

Proceeding on information learned during the

California hearing, Respondent went to the State of Georgia seeking information concerning the adoption of Miss Anderson's child, and successfully determined Petitioner's identity.

Based upon this information, Respondent filed a *habeas corpus* action in the Chancery Court of Madison County, Tennessee, and a hearing was held in said Court on said Petition on August 7, 8, 9, 1979.

After Respondent testified to the above chronology, he attempted to call as his witness Petitioners' Georgia co-counsel as an expert witness on the adoption laws in the State of Geoorgia. Said co-counsel did in fact testify at the request of the Court, and answered questions propounded by both Respondent's attorney and the Court. He established for the record that under Georgia law Respondent was an unknown putative father who was not entitled to notice of the Georgia adoption proceeding.

In addition to his testimony concerning the chronology of the case, Respondent also attempted to testify concerning his fitness as a parent. Petitioners objected to this enlargement of the scope of the hearing, but were overruled by the Court. Respondent proceeded to make representations about his preparations for parenthood, including his having taken instruction in child care from a nun, his having taught catechism to youth in his church, and his having read four books on child care (i.e. *First Five Years, Baby and Child Care, The First Twelve Months of Life,* and *Your Child's Self Esteem.*) Upon cross-examination, Respondent conceded that he was asserting no unfitness of the part of Petitioners as parents.

Having been overruled in their objection to Respondent's introduction of evidence concerning his fitness as a parent, Petitioners countered with their own testimony about their care of their child and in corroboration offered the testimony of a registered nurse (neighbor). In addition, after the hearing, Petitioners moved for an order of reference directing an investigation to be conducted by the Tennessee Department of Human Services into the background of both the Respondent and the Petitioners. At no time did the Trial Court rule on Petitioners' motion and the Petitioners cited this as error in their appeal to the Court of Appeals of Tennessee.

Finally, at the conclusion of the hearing, but before decision, Petitioners filed with the Trial Court a motion for the appointment of a guardian *ad litem* to protect the interests of the child. The Trial Court never ruled on this motion. Instead, on September 21, 1979, the Trial Court ruled that Tennessee did not have to give full faith and credit to the Georgia decree and ordered that Respondent be awarded custody of Petitioners' child, but that the child be placed in the custody of the Tennessee Department of Human Services, in foster care, pending appeal (App. A).

Thereafter, Petitioners sought and obtained a modification of the custody order from the Court of Appeals of Tennessee pending appeal to that Court. Under said modification, Petitioners were allowed to retain custody of their child pending appeal.

On appeal to the Court of Appeals of Tennessee Petitioners assigned as error the failure of the Trial Court to give full faith and credit to the Georgia

adoption order. Also assigned as error was the Trial Court's treatment of an unknown putative father as a legal father fully entitled to notice, with a right to be heard, and as possessing a right to custody of a child with whom he had had no contact. Petitioner's assigned as error the Trial Court's enlargement of the scope of the *habeas corpus* hearing into a superficial inquiry into the merits of custody. Also assigned as error was the failure of the Trial Court to order an independent background investigation of all litigants. Petitioners also assigned as error the failure of the Trial Court to appoint a guardian *ad litem* to protect the interests of the minor child in litigation affecting his present and future custody, property rights, and legal relationships.

Among other cases, Petitioners asserted that the Trial Court had misapplied this Court's rulings in *Stanley v. Illinois*, 405 U.S. 645 (1972); *Quillion v. Walcott*, 434 U.S. 246 (1978), and *Caban v. Mohammed*, 441 U.S. 380 (1979).

The Court of Appeals of Tennessee on July 29, 1980, affirmed the ruling of the Trial Court (App. B). An Application for Permission to Appeal to the Supreme Court of Tennessee was timely filed and was denied by that Court on October 6, 1980 (App. C). Upon motion by Petitioners, the Court of Appeals of Tennessee on October 17, 1980, granted a stay of the enforcement of the order transferring custody of the child to Respondent until appellate procedures were completed, including the Petition for *Certiorari* to this Court.

The child, Joseph Ryan Riggs, has lived his entire life of twenty-three months with Petitioners as a

member of the only family he has ever known.

REASONS FOR GRANTING THE WRIT

I.

In holding that Tennessee did not have to give full faith and credit to the Georgia Final Order of Adoption on the basis that it was violative of Tennessee's public policy and the Constitution of the United States, the Court of Appeals of Tennessee decided a Federal question in conflict both with the decision of another state court of last resort and with applicable decisions of this Court.

The Petitioners, in complete innocence and without any knowledge whatsoever of the birth father, duly complied with all requirements of Georgia law and obtained a Final Order of Adoption for their infant son. According to Georgia law, the Georgia Court had both subject matter and personal jurisdiction over all necessary parties to the adoption. The adoption decree contains a recitation of jurisdiction and otherwise appears to be valid and regular on its face.

Subsequently, however, the Court of Appeals of Tennessee refused to give full faith and credit to that Final Order of Adoption, because, in its words, "[W]e are not obliged to give full faith and credit to any judgment of a state which we hold to be violative of Tennessee's public policy or the Federal Constitution." (App., p. 8b).

A. The Conflicting Public Policy Rationale.

The very function of the Full Faith and Credit Clause is to compel the states to give effect to the contrary policies of other states when these have

been validly embodied in a judgment. To this extent, this clause of the Constitution has foreclosed the freedom of the states to apply their own local policies. The foreclosure was not intended only for slight differences or for unimportant matters. It was also for the most important ones, such as the establishment of a family through a final order of adoption.

According to a host of decisions of this Court, it is settled that Tennessee must give the same effect to the Georgia Final Order of Adoption that would be given it in Georgia. *See, e.g. Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430 (1943); *Williams v. North Carolina*, 317 U.S. 287 (1942); and *Fauntleroy v. Lum*, 210 U.S. 230 (1908).

The putative father is not deemed to be a necessary party in every adoption under Georgia's adoption statutes. The record contains testimony concerning the purpose and construction of the Georgia adoption statutes as they relate to the putative father, and such provisions were dealt with at length in Petitioners' brief to the Tennessee Court of Appeals.

Georgia Code Section 74-406 (1977) seeks to determine whether or not the putative father has ever lived with the child, contributed to its support, or the support of the birth mother, or made some other tangible expression of interest in the child, when viewed from the perspective of the child. Based upon the evidence before it, the Georgia Court was able to reach a finding of fact *uncontradicted* by Respondent that he had not established any of these essential connections with the child. The Georgia Court was never required to reach the question of Respondent's identity and the birth mother's withholding of

that information was irrelevant to the full implementation of the Georgia adoption statute concerning notice to a putative father.

Respondent's position before the Georgia court was that of a bare putative father: a mere impregnator, not a *de facto* father, and certainly not a *de jure* father. As such, he was not an essential party to the proceeding, nor was he entitled to receive notice of the proceeding, and the mother's exercise of her privacy right (though accomplished through an inaccurate statement) did not prevent the full implementation of Georgia law. (*See*, App. D.)

The Tennessee Court saw fit to interpret and hold the Georgia adoption statute to be violative of Tenesssee's public policy. That court imposed what it determined (contrary to Tennessee's adoption statute) to be Tennessee's policy (*i.e.* a putative father is a necessary and indispensible party in all adoptions) upon Georgia's adoption statutes. Petitioners submit that the Full Faith and Credit Clause was intended to preclude such results and requires that the Georgia Final Order of Adoption be given the same effect in Tennessee as it has in Georgia.

The decision of the Court of Appeals of Tennessee is in direct conflict with the principle embodied in the decisions in the courts of last resort of New Mevico and North Carolina, and, therefore, demonstrates a conflict in the application of the Full Faith and Credit Clause to final orders of adoption.

In *Delaney v. First National Bank*, 73 N.M. 192, 386 P.2d 711 (1963), the Supreme Court of New Mexico held that a judgment of adoption entered by a foreign court which was not capable of entry by a

New Mexico court because it would have offended the public policy of that State, could not be denied full faith and credit. *See also, Ex parte Osborne*, 205 N.C. 716, 172 S.E. 491 (1934).

The adoption statutes of no state, including Tennessee, require that a putative father be deemed an indispensible party to all adoption proceedings involving his possible biological offspring. The public policy interpretation of the Tennessee Court has the practical effect of rendering final orders of adoption voidable at the option of the putative father, rather than enforceable under the Full Faith and Credit Clause.

As was stated by Mr. Justice Stevens in his dissenting opinion in *Caban v. Mohammed*, 441 U.S. 380 (1979), "The adoption decrees that have been entered without the consent of the natural father must number in the millions. An untold number of family and financial decisions have been made in reliance on the validity of those decrees." Petitioners have one of those "millions" of decrees as they, in reliance upon Georgia's adoption statutes created a family unit through the institution of adoption. Unless their Final Order of Adoption is entitled to full faith and credit, they will represent the "millions" whose adoptions are subject to being retroactively voided at the option of a birth father who had established no familiar relationship with his out-of-wedlock child. Unless the decision below is reviewed and reversed by this Court, the institution of adoption will be significantly damaged and the prospect of future adoptions will vanish for untold numbers of out-of-wedlock children.

B. The Unconstitutionality Rationale.

In ruling that a birth father who has established no relationship with an illegitimate infant child is entitled to notice and a right to be heard in a proceeding to adopt the child, the Tennessee Court of Appeals has decided an important question of Federal constitutional law which has not been, but should be, settled by this Court.

In its opinion, the Court of Appeals of Tennessee held that "[T]he Appellee [Respondent] has established through his sperm and through his efforts to find his natural child such a relationship with the child as to entitle him to due process of law in any proceeding adverse to his parental rights." (App., p. 16b). In so holding, the Tennessee Court accorded due process rights to the Respondent which no court has heretofore granted unto a putative father and thereby afforded him a legal status which is not justified in fact or in law. The Tennessee Court appears to have placed excessive significance on the biological relationship between the Respondent and the child, ignoring a developing body of this Court's precedents.

The Tennessee Court's conclusion that the Respondent "amply meets the test of *de facto* fatherhood as set out in *Stanley* and *Quilloin*" appears clearly erroneous. (App., p. 18b). In reaching its conclusion, the Tennessee Court apparently equated intentions with actions. Petitioners submit that is not enough. It is clear from this Court's opinion in *Stanley v. Illinois*, 405 U.S. 645 (1972), that the private interest that warranted protection was "that of a man and the children he has sired *and raised.*" (Empha-

sis added.) No parallel can be drawn between Respondent's intended relationship with the child whom Petitioners were caring for during the pendency of the Georgia adoption proceeding and Mr. Stanley's relationship with his children. It was Mr. Stanley's developed relationship over the eighteen years during which he exercised his rights and discharged his responsibilities in the upbringing of his children that entitled him to the status of a *de facto* father, *not* his mere blood relationship.

Petitioners emphasize that the holding of this Court in *Stanley, supra,* does not support the Tennessee Court's decision in this case as it does not stand for the proposition that *every* putative father is entitled to notice and a right to be heard in connection with *every* adoption. Such a position was rejected by the Court of Appeals of Florida in *Department of Health and Rehab. Services v. Herzog,* 317 S.2d 865 (Fla. App. 1975). That case, as this one, involved the application of *Stanley, supra,* to the adoption situation involving an illegitimate infant child. The Florida Court held that unless the putative father had lived with the child, contributed to its support or given some other tangible indication of interest in the child, he was not entitled to notice.

It was this standard which was used as a model when the Georgia adoption statutes were revised in 1977. It was *not* the intention of the Georgia Legislature to accord *every* putative father the right to notice and a right to be heard in *every* adoption, but only those whose conduct, *when viewed from the most critical perspective of the child,* demonstrated tangible interest.

Petitioners assert that the Tennessee Court's decision, based in part on the conclusion that the Respondent achieved *de facto* fatherhood as defined in *Stanley, supra,* is unsupportable by comparison of the record in this case with the facts in *Stanley.* Further, Petitioners submit that no case can be cited in support of the conclusion that intentions to act can be deemed equivalent to a demonstrated pattern of behavior when it comes to familial relationships.

The only relationship which the Tennessee Court of Appeals can substantiate as existing between the Respondent and the Petitioners' child is the blood relationship. A blood relationship alone is *NOT* "such a relationship with the child as to entitle him to due process of law in any proceeding adverse to his parental rights." (App., p. 16b). To be entitled to such rights a *de facto* father must have a familial relationship *with* the child, rather than merely a blood relationship *to* the child, and the familial relationship can only come into existence through physical contact over time. Neither blood nor intentions is enough. Without a familial relationship, there is no requirement that a putative father be afforded notice and a right to be heard in connection with the termination of whatever rights he may have.

Petitioners note that the *de facto* fatherhood relationship that existed in the case of *Quilloin v. Walcott,* 434 U.S. 246 (1978), did not coincide with the blood relationship. Instead, it was the stepfather who had achieved *de facto* fatherhood, and his rights were held to prevail over the birth father who had no relationship with his child, except by blood.

In this Court's most recent decision in this area,

Caban, supra, it was again the existence of a familial relationship which was pivotal. In that decision, this Court stated that in those cases where the father has not participated "in the rearing of his child, nothing in the Equal Protection Clause precludes the State from withholding from him the privilege of vetoing the adoption of that child." 441 U.S. at 392. Though Respondent has not even seen Petitioners' child the Tennessee Court concluded that Respondent "has come forward to participate in the rearing of his child within the meaning of the *Caban* guidelines." (App., p. 17b). Based upon that conclusion, the Tennessee Court proceeded to find that Respondent "should have been allowed the privilege of vetoing" the adoption. (App., p. 17b.)

Although *Caban, supra,* did not involve an application of the due process clause, this Court's opinion was clearly limited to cases "where the father has established a substantial relationship with the child and has admitted his paternity." (441 U.S. at 393). It seems clear that this Court confined its holding to cases involving the adoption of an *older* child against the wishes of a natural father who admitted paternity and previously had participated in the rearing of the child.

The instant case deals with the adoption of an infant with whom the birth father (though having admitted paternity)has never had any contact. The Tennessee Court's construction of Federal Constitutional law is in conflict with the clear import of this Court's decisions.

Under the rationale of the court below, unless some individual could be unequivocally established as

the birth father of every out-of-wedlock child placed for adoption, no such child would be adoptable. Such a result would deny millions of such children like Joseph Ryan Riggs the right to a prompt and secure placement in a permanent home.

II.

In holding that the putative father is a necessary party to an adoption proceeding involving the out-of-wedlock child he has simply sired, by implication, the Court of Appeals of Tennessee failed to recognize the constitutional right of privacy of the birth mother to refuse to disclose the identity of the putative birth father of her infant child whom she desires to surrender for adoption. Through such decision, the Tennessee Court has decided an important question of Federal law which has not been, but should be, settled by this Court.

In the line of cases including *Roe v. Wade*, 410 U.S. 152 (1973), *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1975), and *Caban, supra*, this Court has indicated that there is a right to privacy possessed by a mother which at least in some instances includes her exclusive power to determine the destiny of her offspring.

As Mr. Justice Stevens noted in his dissenting opinion in *Caban, supra* at 402, there are "[T]housands of children who are born out-of-wedlock every day." As adoption is an important solution to the problem of illegitimacy, a great many of these illegitimate children have an interest in being adopted. Since it is a biological fact that each out-of-wedlock child must have had a birth father, it follows that

these children will be denied adoption under the Tennessee rationale unless their birth father can be given notice and a right to be heard at any adoption proceeding. As Mr. Justice Stevens noted, "In many cases, only the birth mother knows who sired the child, and it will often be within her power to withhold that fact, and even the fact of her pregnancy, from that person." To compel disclosure would offend the birth mother's right to privacy under the Constitution of the United States. Even if the birth mother does not surrender her privacy right by disclosing the name of the birth father of her child in those situations where she in fact knows it, her privacy right would be compromised through efforts to notify the unknown birth father, for as Mr. Justice Stevens observed in his dissenting opinion in *Caban*, *supra*, n. 17, at 408:

> [T]o be effective, any such notice would probably have to name the mother and perhaps even identify her further, for example by address. Moreover, the terms and placement of the notice in, for example, a newspaper, no matter how discrete and tastefully chosen, would inevitably be taken by the public as an announcement of illegitimate maternity. To avoid the embarrassment of such announcement, the mother might well be forced to identify the father (or potential fathers) — despite her desire to keep that fact a secret.

It is submitted that the birth mother's right to privacy may be exercised by her either through her affirmative refusal to identify the birth father or, as is probably more common, through a misstatement that his identity is unknown to her. As an alternative to the unknown father, she might instead de-

cide to provide a fictitious name. The practical effect is the same in each situation. If the adoption statutes look to the existence, or non-existence, of a familial relationship between a birth father and the child, then in those situations where such familial relationship exists, notice will be afforded to the putative father and he will be accorded his due process rights as this court has defined them in the decisions of *Stanley*, *Quilloin* and *Caban*, *supra*. Again, it is relationship that is worthy of protection and the birth mother's right to privacy does not have to be compromised in order to ascertain whether or not such a relationship between father and child in fact exists. It should be demonstrated by objective evidence obtainable by an examination of a child's life. Since it is capable of objective determination without the invasion of the mother's privacy, her right to that privacy should be protected.

In *Roe v. Norton*, 422 U.S. 391 (1973), this Court reversed and remanded for reconsideration of the issue of the mother's privacy right as it related to her identification of the putative father as a condition precedent to her child's receipt of governmental financial assistance. In the instant case, the Tennessee Court has failed to recognize the birth mother's right to privacy and has in effect required her to yield that right as a condition precedent to the placement of her child for adoption.

III.

In construing and applying retroactively *Caban*, *supra*, to a case involving an infant with whom the putative father had not established a relationship, the Tennessee Court has decided an important ques-

tion of Federal law in a way which conflicts with applicable decisions of this Court.

The Court of Appeals of Tennessee stated:

> The appellants [Petitioners] contend that we cannot apply the guidelines set out in *Caban* to the case at bar because *Caban* cannot be retroactively applied. We disagree. *Caban* does not overrule clear past precedent on which litigants may have relied, nor does it decide an issue of first impression whose resolution was not clearly foreshadowed. (App., p. 17b.)

Caban, supra, was decided on April 24, 1979. The Final Order of Adoption in the instant case was entered in the Superior Court of Colquitt County, Georgia on April 12, 1979, twelve days before this Court's decision in *Caban, supra.* The Tennessee Court, however, specifically ruled that *Caban* could be retroactively applied, contrary to decisions of this Court.

In *Chevron Oil Co. v. Huson,* 404 U.S. 97 (1971), this Court described the three factors to be considered in dealing with the issue of nonretroactivity. Those factors are: whether a new principle of law has been established, whether retroactive application will further or retard the operation of the rule, and whether the retroactive application of the rule could produce inequitable results.

Clearly, the *Caban* rule was a new principle of law and the retroactive application of the rule to the instant adoption, granted before *Caban, supra,* will result in a grievous injustice.

In his dissent to *Caban, supra,* Mr. Justice Stevens clearly described the damage which would result

from a retrocative application of the rule:

> The adoption decrees that have been entered without the consent of the natural father must number in the millions. An untold number of family and financial decisions have been made in reliance on the validity of those decrees. Because the Court has crossed a new constitutional frontier with today's decision, those reliance interests unquestionably foreclose retrocative application of this ruling. Families that include adopted children need have no concern about the probable impact of this case on their familial security. (441 U.S. at 415-16)

Mr. Justice Stewart in a separate dissenting opinion, agreed

> [T]hat retroactive application of the Court's decision today would work untold harm, and I fully subscribe to Part III of Mr. Justice Steven's dissent. (441 U.S. at 401)

This Court expressly did not consider the difficulties of applying the rule of *Caban* to adoptions of newborn infants. Mr. Justice Powell said:

> Because the question is not before us, we express no view whether such difficulties would justify a statute addressed particularly to newborn adoptions, setting forth more stringent requirements concerning the acknowledgment of paternity or a stricter definition of abandonment. (441 U.S. at 392, n. 11)

In addition, Mr. Justice Stevens described the effect of the *Caban* decision upon future adoptions:

> The procedure to be followed in cases involving in-

> fants who are in the custody of their mothers — whether solely or jointly with the father — or of agencies with authority to consent to adoption, in entirely unaffected by the Court's holding or by its reasoning. In fact, as I read the Court's opinion, the statutes now in effect may be enforced as usual unless "the adoption of older children is sought," . . ., and: the father has established a substantial relationship with the child and [is willing to admit] his paternity." (441 U.S. at 416)

The Tennessee Court, however, ruled that Respondent "has come forward to participate in the rearing of his child within the meaning of the *Caban* guidelines. This means that in the Georgia Court he should have been allowed the privilege of vetoing his child's adoption." (App., p. 17b).

Thus, the Tennessee Court has specifically applied retroactively the *Caban* guidelines to the adoption of an infant and, consequently, has decided an important Federal question in a way which conflicts with, and surpasses, the decisions of this Court.

IV.

In removing Petitioners' adopted child from their family without first finding them to be unfit parents, the Tennessee Courts denied Petitioners their constitutionally protected liberty rights; and thereby decided an important Federal question which has not been, but should be, addressed by this Court.

Petitioners assert that they are both the *de jure* and *de facto* parents of their minor child and as such possess a constitutionally protected liberty interest in the integrity of their family unit. *Cleveland Board*

of Education v. La Fleur, 414 U.S. 632 (1974).

In reliance upon a surrender of parental rights executed by the birth mother of her illegitimate child, Petitioners proceeded within the bounds of Georgia law and the Constitution of the United States to become the legal parents of that child by adoption. As this Court expressly recognized in *Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816 (1977) at 844, adoption is a prime example of a constitutionally protected "deeply loving and interdependent relationship between an adult and a child in his or her care [which] may exist even in the absence of blood relationship." Petitioners took this child into their home three days after his birth, continued to provide for his care and nurture after the decree of adoption, and were secure in their family life until the ruling of the Trial Court on the putative father's *habeas corpus* petition.

In *Smith*, *supra*, this Court recognized two distinctions between the biological or "natural" family and a foster family which, in turn, justify differential regard toward the assertion of any liberty interest in the family relationship under the Constitution of the United States.

First, unlike foster parents whose relationship is limited at the outset by the terms of a boarding contract with the state, Petitioners as adoptive parents had justifiable and constitutionally protected expectations in the continuation of their adoptive family status free from subsequent interference by any state except those relating to a charge of their unfitness as parents for the trust of custody. The

origins of the relationship between Petitioners and their child lie in an independent (privately arranged) adoption involving a voluntary and total release to them of all parental rights possessed by the mother in her illegitimate infant child. Such independent adoptions are legally sanctioned in the overwhelming majority of states including Georgia. The Final Order of Adoption entered by the Georgia Court confirmed that there were no outstanding legal rights without limitation in degree or duration upon Petitioners as adoptive parents.

Second, according full recognition of the liberty interests of these adoptive parents does not derogate from the substantive liberty rights of others, *i.e.*, the birth mother or the putative father. All rights of the birth mother were surrendered to and are possessed by the Petitioners, a conclusion which was confirmed by the Georgia Final Order of Adoption and which is apparently conceded by the Respondent. Although Petitioners are not insensitive to the plight of the putative father in this case, they in no way either created or knowingly contributed to his inability to establish a relationship with this child. The "rights" of this putative father in this infant child were at best inchoate claims at all times prior to the entry of the Final Order of Adoption. The Georgia Court considered and properly discounted any cognizable parental rights of an unknown putative father in this child. Its decree severed any inchoate claims of the putative father and should have precluded any subsequent assertion of "rights" by him in Georgia or in any other sister state.

V.

Both the Tennessee Courts not only refused to

honor the fundamental rights and justifiable expectations of Petitioners arising from the Georgia Final Order of Adoption, but also proceeded to deny them procedural due process and equal protection of the laws in the custody hearing. In so doing the Tennessee Courts decided a Federal question in conflict with applicable decisions of this Court.

Despite Petitioners' strenuous objections the Trial Court reversed the legal presumptions demanded by these facts and awarded custody to the putative father based upon little more than his naked assertion of a preferred status as their child's birth father.

Perhaps the pivotal issue in this case is a determination of who are the "parents" of this child? According to the Parental Rights Doctrine, the traditional rule of law in American jurisdictions, the "legal" parents of a child are entitled to his custody unless they have forfeited their rights or are expressly found to be unfit. Although Tennessee has apparently never addressed the applicability of the Doctrine in parent-third party custody disputes, Georgia law clearly would accord that presumption to a child's legal parents by adoption. Georgia Code Section 74-108; *Perkins v. Courson*, 219 Ga. 611, 135 S.E.2d 388 (1964).

More importantly, Petitioners as adoptive parents assert a claim as a "natural family" within the protection extended by this Court in the course of its opinion in *Quilloin*, *supra* at 255:

> We have little doubt that the Due Process Clause would be offended [i]f a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without

some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest. *Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816, 97 S.Ct. 2094, 2119, 53 L.Ed.2d 14 (1977) (Stewart, J. concurring).

In its opinion the Court of Appeals of Tennessee held that "This state has a strong interest in sustaining the father-child relationship and protecting the family unit." (App., p. 18b). As applied to the instant case, such a policy is cruelly ironic: the inchoate putative father-child relationship never ripened into anything other than biological fact while the family unit which flowered into a legal and an actual relationship of daily intimacy is being destroyed by the application of the announced policy.

Petitioners assert that the underlying policy upon which the Court of Appeals of Tennessee based its decision can be stated simply as "bloodlines are best." Regardless of the innocence and good faith of the adoptive parents, the interests of the child in stability and permanence of relationship, and the existence of a Final Order of Adoption, it is now the policy of the State of Tennessee to unite blood relatives rather than to protect legally created family relationships. Such a policy is repugnant to the maintenance of the institution of adoption in this country and is unsupportable in light of modern social science research and the protection accorded by this Court to the "intimacy of daily association" in its decisions in *Smith*, *supra*, and *Quilloin*, *supra*.

Even as the Tennessee Trial Court purported to base its award of custody of this child to its putative

father on a "best interests of the child" standard, it refused to conduct a full inquiry concerning the merits of the competing claims to custody. When it became clear to Petitioners that the Tennessee Trial Court was predisposed to consider the putative father's claims to custody on the merits, they sought an objective evaluation of his present fitness and present ability to care for the child and voluntarily submitted themselves to a similar assessment. Nevertheless, the Trial Court ruled in favor of the putative father's demand for custody without permitting any further evidence. The order appealed from is in direct contravention of the limited and carefully constructed prior decisions of this Court.

In *Rothstein v. Lutheran Social Services*, 405 U.S. 1051 (1972), *Stanley, supra,* and *Quilloin, supra,* this Court has clearly distinguished between the procedural due process rights of a putative father and any claim which he may have to the child's actual possession and control. In effect, the Trial Court's conclusion that the putative father was entitled to notice and an opportunity to be heard was converted into the entry of summary judgment in his favor.

At a minimum, this Court should intervene to restrain the Tennessee Courts from ordering the summary release of this young child to one who is but a stranger to him and whose present ability to provide for his needs is as yet unexplored. This Court so intervened in *Rothstein, supra,* and charged in its remand that the trial court give "further consideration in light of *Stanley* . . . with due consideration for the completion of the adoption proceeding and the fact that the child has apparently lived with the adoptive family for the intervening period of time."

VI.

By refusing to appoint a guardian *ad litem* for the infant child and to permit a full exploration of the issue of his custody, the Tennessee Courts denied the adoptive child his due process rights under the Constitution of the United States and thereby decided an important question of Federal law which has not been, but should be, settled by this Court.

As this Court recognized in dictum in its decision in *Wisconsin v. Yoder*, 406 U.S. 205 (1972), a minor child may have interests and rights under the constitution which cannot be fully protected in litigation involving his welfare and best interests by means of derivative representation by named adult parties.

A child's assertion of a constitutional claim to protection against the grievous loss of home and family in the context of a civil custody case has never been squarely presented to this Court. *Cf. In re Gault*, 387 U.S. 1 (1967) and *J. L. and J. R. v. Parham*, 442 U.S. 584 (1979).

However, in *Rothstein, supra*, this Court intervened to remand the case to the trial court for a consideration of the child's fundamental rights in a custody dispute between his adoptive parents and his putative father.

Furthermore, in *Smith, supra*, n. 44, at 841, this Court indicated the proper process necessary to insure a full development of any independent fundamental rights to the integrity of his family unit which a minor child may possess:

[C]hildren usually lack the capacity to make that

> sort of decision [involving the assertion of their constitutional rights], and thus their interest is ordinarily represented in litigation by parents or guardians. In this case, however, the State, the natural parents, and the foster parents, all of whom share some portion of the responsibility for guardianship of the child . . . are parties, and all contend that the position they advocate is most in accord with the rights and interests of the children. In this situation, the District Court properly appointed independent counsel to represent the children, so that the court could have the benefit of an independent advocate for the welfare of the children, unprejudiced by the possibly conflicting interests and desires of the other parties.

Although the Tennessee Trial Court had pending before it a motion that a guardian *ad litem* be appointed to represent the interests of this minor child, it awarded custody of the child to the putative father without taking any action to appoint or to seek the advice of an independent advocate for the child.

It is theoretically impossible for any child to ever claim the ear of a trial court in matters so fundamentally affecting his life, liberty, and property unless his interests can be protected and presented by a guardian *ad litem.* On this narrow issue alone is this Court justified in intervening to reverse the decision below. Having attempted and failed to secure representation for their child in the proceedings below, Petitioners assert the independent due process rights of their child because he has no other advocate.

CONCLUSION

The decision of the Court of Appeals of Tennessee in the instant case is in conflict with decisions of this Court and a threat to the institution of adoption. This case presents the opportunity for this Court to consider and settle issues of monumental concern to the institution of adoption in this country, which issues have been precipitated by this Court's decisions, and particularily those in *Stanley v. Illinois*, *Quilloin v. Walcott*, and *Caban v. Mohammed*.

For the reasons stated Petitioners respectfully and earnestly pray that their Petition for *Certiorari* be granted.

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APPENDIX A

IN THE CHANCERY COURT OF MADISON COUNTY, TENNESSEE

IN RE: JOSEPH RYAN RIGGS, A Minor, ROBERT TERRAZAS *VS.* TOMMY JOE RIGGS and ANN MARIE RIGGS	RULE DOCKET NO. 31079

OPINION

The application of Plaintiff, Robert Terrazas, for a writ of habeas corpus and custody of his son, Joseph Robert Terrazas, came regularly on for hearing on August 7, 1979, before this Court. Plaintiff appeared in person and by his counsel; defendants appeared in person and by their counsel. Upon review of the file, testimony of witnesses and arguments of counsel, and for good cause shown, the Court finds:

1. Plaintiff, Robert Terrazas, is the natural father of the infant male born to Roneva Anderson on January 29, 1979, in Reno, Nevada, while she was using the assumed name of Jessica Stewart.

2. Joseph Ryan Stewart (Exhibit 2), Joseph

Ryan Riggs (Exhibit D-1), and Joseph Robert Terrazas (Exhibit 3) are, in fact, one person; that Joseph is the natural son of Robert Terrazas and Roneva Anderson, and that he is the child whose custody is at issue.

3. Plaintiff, Robert Terrazas and Roneva Anderson began dating and entered into a serious relationship in the fall of 1977. Both were students at Santa Clara University; he was in his final year of law school and she was in her second year of college. During this time they looked at their relationship with an eye toward marriage and had announced such intentions to their friends and families. In May of 1978, Miss Anderson became pregnant. They discussed different aspects of the pregnancy with each other. Initially, they planned to accelerate their marriage plans. Anderson soon thereafter decided that marriage was apparently not a viable option for her and thus rejected this alternative. She alluded to the idea of giving up the child for adoption. Plaintiff told her that the child should not be given up for adoption but instead that it would be best if he took care and custody of his child.

When it appeared that plaintiff would not consent to the adoption of the child, Miss Anderson cut off communication with plaintiff. Without the plaintiff's knowledge, she moved to three different cities in three states (Modesto, California; Reno, Nevada; Portland, Oregon) in order to keep plaintiff from finding her and from finding the child.

When it became clear to plaintiff that he was no longer loved by Miss Anderson, that marriage was out of the question, and that she would not com-

municate with him, he concentrated on preserving and asserting his rights as the father of his child. He retained counsel two months prior to the birth of his child. On November 28, 1978, he filed a petition in the Superior Court of the county of the mother's residence to establish the existence of a parent-child relationship with his yet unborn child. The efforts for service upon the mother required traveling several hundred miles throughout California. Plaintiff wrote and talked with the headquarters for State adoption bureaus in California, Arizona, Colorado, Nevada, and Oregon and informed them of his effort to find and have custody of his child. He also contacted by letter seventy-nine public and private agencies within California and informed them of his efforts. In early January, 1979, he traveled many miles from his home to Modesto, California to contact Father William Ryan who knew of the mother's whereabouts and who, it turned out, was the intermediary arranging for the placement of Joseph. Father Ryan, who was plaintiff's only hope and link of finding the mother at this crucial time, was evasive and would not reveal her whereabouts.

While plaintiff was making his efforts, Miss Anderson also contacted Father William Joseph Ryan in Modesto, California. Father Ryan introduced the mother to Sister Julianna of the Dominican Order at St. Mary's Convent and Hospital in Reno, Nevada. Arrangements were made in December, 1978, for Miss Anderson to live in Reno at St. Mary's where Joseph was born. Father Ryan also contacted the defendants, Tommy Joe and Ann Marie Riggs in Moultrie, Georgia, in December, 1978, about adopt-

ing the child to be born to Miss Anderson. The Riggs had never applied to any private or public agency to adopt a child and were and are capable of having their own children.

On December 18, 1978, the defendants, Riggs, made payable to Father William Ryan a two thousand dollar check to cover the laying and delivery expenses of Miss Anderson and the baby. Father Ryan and Sister Julianna are friends of Mr. and Mrs. Riggs.

Also at this time Miss Anderson procured from the California and Nevada Departments of Motor Vehicles identification as Jessica Stewart. Later when Joseph was born, the mother signed as Jessica Stewart a release, a surrender, and an affidavit denying any knowledge of the name and whereabouts of Joseph's biological father; when, in fact, she knew the father was the plaintiff and knew his address. A birth certificate for Joseph was also signed by Jessica Stewart on January 31, 1979, without naming a father for Joseph. The mother left Joseph with Sister Julianna in Reno and returned to her home in Calaveras County, California, where she was served with the California lawsuit on February 25, 1979. Sister Julianna then delivered Joseph to the Riggs in Moultrie, Georgia.

On February 12, 1979, defendants moved to adopt Joseph in Colquitt County, Georgia, whereupon the false affidavits of Jessica Stewart/Roneva Anderson were attached as necessary exhibits for use in determining plaintiff's rights to notice of the Georgia proceedings.

On March 1, 1979, a hearing was held in Colquitt County, Georgia, whereby defendants moved to cut off the rights of the putative father. Based upon oral testimony and the proof, this Court finds that no attempt was ever made to give plaintiff, Robert Terrazas, notice that his parental rights were being determined in a court of law.

This finding is supported by evidence that neither the Georgia Department of Human Resources nor anyone else made any attempt to verify the natural father's identity or whereabouts. Either a simple investigation by an agency in one of Georgia's sister states or a couple of phone calls could have prevented ignoring plaintiff's fundamental rights and jeopardizing the emotional well-being of many people.

Soon after initiating these proceedings, Mr. Riggs accepted new employment in Tennessee. Defendants began exploring housing opportunities and signed an agreement to purchase a house in Jackson, said agreement being dated March 17, 1979. Thereafter, defendants left Moultrie, Georgia, on April 13, 1979, the day after the Georgia proceedings concluded.

Miss Anderson was served with plaintiff's California complaint on February 25, 1979, even though it was clear that plaintiff would pursue his legal rights to Joseph, the mother continued to make misrepresentations about the plaintiff and about Joseph's birth. On March 2, 1979, Anderson/Stewart talked with the Georgia Department of Human Resources and denied once again, any knowledge about the plaintiff, Joseph's father. On March 22, 1979, Miss Anderson also filed a declaration in Calaveras

County falsely swearing that she had never given birth to a child, nor had she ever placed a child out for adoption. Not until April 30, 1979, the hearing date for plaintiff's California cause of action, did plaintiff obtain any knowledge about his son's birth and probable whereabouts.

Plaintiff then contacted the Nevada Department of Human Resources, Section of Vital Statistics, and amended Joseph's original birth certificate to include the true names of Joseph's mother and father.

This Court finds that there is only one birth certificate for Joseph: The original certificate reading Joseph Ryan Stewart has been sealed by plaintiff and amended by plaintiff to read JOSEPH ROBERT TERRAZAS.

Thereafter, plaintiff traveled to Georgia to assert and defend his rights as the father of his child and to object to any proposed adoption. Plaintiff discovered Joseph and defendants were, in fact, no longer in Georgia, the defendants having already moved to Jackson, Tennessee. Plaintiff then traveled to this State and again asserted his rights as the natural father of his son and objected to any custody privileges over Joseph that defendants have asserted.

4. The Court finds on the testimony before it that defendants were told by Father Ryan in April, 1979, that the putative father was looking for Joseph. Acting on this information defendants contacted legal counsel in Stockton, California, in April, 1979, to inquire into the California proceedings regarding plaintiff's attempts to find Joseph.

5. The Court finds that fraud pervaded the Geor-

gia decision to grant defendants custody of Joseph and that fraud prevented plaintiff from getting notice of the Georgia proceedings. It also prevented plaintiff from asserting and defending his rights as Joseph's natural father. This conclusion is supported by the findings of the California Court, the false affidavits relied upon by the Georgia Court, and the abundant proof that plaintiff was earnestly and assiduously searching for his son throughout four jurisdictions. Plaintiff's efforts are also supported by the finding of this Court that he has incurred expenses well in excess of $12,000.00 and has retained a battery of lawyers in four different states.

6. This Court finds that the Georgia Court lacked jurisdiction over plaintiff. The natural father's rights were never lawfully terminated and he never voluntarily surrendered, abandoned, or relinquished his parental rights to Joseph.

7. Plaintiff was prevented from participating in the Georgia proceedings by not being given notice of them. As the natural father of Joseph, plaintiff was denied a hearing on his fitness for the custody of his son. For the reasons set out in the findings hereinbefore the Court does not give full faith and credit to the Georgia decree.

8. The Court finds that plaintiff and defendants are each sincere and well intentioned in their conduct and that each wants what is best for Joseph. The Court finds both sides to be fit people for custody of a child.

9. This Court finds plaintiff to be a fit, qualified, and suitable person to assume custody of his son.

10. This Court finds no competent evidence of unfitness, incompetence, surrender, or abandonment on the natural father's part.

11. The Court has weighed the evidence produced at trial, the exhibits admitted into evidence, and the arguments of counsel and, based upon such proof, the Court finds that it is in Joseph's best interest to be in the care and custody of his natural father, Robert Terrazas. It is clear to the Court that the father, plaintiff, has continually and consistently sought custody of Joseph and has been anxiously willing, able, and ready to assume the full responsibility of parenting his son. At the same time, the mother and her consorters were striving to put the child out of plaintiff's reach by making false and misleading statements in two different legal actions and by purposefully circumventing plaintiff's fundamental rights as a father.

12. The Court finds that the plaintiff is ready to assume full parental responsibilities. This conclusion is supported by the proof before the Court. The father has the personal ability to fulfill a child's need for support, affection, stimulation, guidance, and restraint. He has sought professional direction and has become involved with a Catholic nun who is connected with a home for unwed mothers and has experience in counselling unmarried parents. He traveled over ninety miles a week since January to seek her advice and instruction. He has been instructed and informed on the physical care of infants. He would make a good father and a fine role model. This is supported further by overwhelming proof showing a father desperately reaching out to keep his child.

Even before Joseph's birth the father was making living arrangements, finding professional employment, obtaining legal counsel, and preserving his parental rights to Joseph. He has crossed a continent searching for his son who was placed in the hands of strangers by intermediaries the father does not know. This father clearly wants to assume and enjoy the responsibilities and obligations of fatherhood. In addition, plaintiff is a law school graduate preparing to take a bar exam and enter employment in the legal profession. He also has the support of his family to help support Joseph as is evidenced by their relative affluence and their financial contribution to the burden of this lawsuit.

Upon a consideration of the facts of this case, together with the applicable law, it is the finding of the Court that plaintiff be awarded custody of his minor son, Joseph.

Pending further hearings and appeals in this matter, this Court (very sadly and reluctantly) orders that the minor child be placed in the protective custody of the Tennessee Department of Human Services.

Counsel will prepare a decree accordingly.

JOE C. MORRIS, CHANCELLOR

TO THE CLERK AND MASTER:
File this Opinion as part of
the Technical Record in this
cause but same need not be
copied on the minutes of the
Court. This September 21, 1979.

IN THE CHANCERY COURT OF MADISON COUNTY, TENNESSEE

IN RE: JOSEPH RYAN RIGGS, A Minor, ROBERT TERRAZAS *VS.* TOMMY JOE RIGGS and ANN MARIE RIGGS	RULE DOCKET NO. 31079

ORDER MAKING ADDITIONAL FINDING OF FACT

This cause came on to be heard on the 27th day of September, 1979, upon the motion of defendants for additional findings of fact, upon the statements of counsel, and upon the entire record in this cause. From all which, it appears to the Court that said motion is well taken and that the Court's previous opinion should be amended to include the following finding of fact: defendants had custody of the minor child Joseph Ryan Riggs pursuant to and by virtue of a final order of adoption entered in the Superior

Court of Colquitt County, Georgia, on April 12, 1979.

All of which is so ordered and adjudged.

ENTERED: This the 27th day of September, 1979.

Honorable Joe C. Morris,
Chancellor

Approved For Entry:
Edwin M. Saginar and
George L. Morrison
By /s/ EDWIN M. SAGINAR
Attorneys for Petitioner

Waldrop, Hall, Tomlin & Farmer
By /s/ JAMES D. TODD
Attorneys for Respondents

APPENDIX B

IN THE COURT OF APPEALS OF TENNESSEE
WESTERN SECTION AT JACKSON

IN RE: JOSEPH RYAN RIGGS, A Minor, ROBERT TERRAZAS *Petitioner-Appellee* *VS.* TOMMY JOE RIGGS and ANN MARIE RIGGS *Defendants-Appellants*	FROM THE CHANCERY COURT OF MADISON COUNTY AT JACKSON HONORABLE JOE C. MORRIS CHANCELLOR

FOR PETITIONER-APPELLEE
George L. Morrison of Jackson
Edwin M. Saginar of Atlanta,
Georgia
Nordin F. Blacker of San Jose,
California

FOR DEFENDANTS-APPELLANTS
James D. Todd of Jackson
James B. Outman of Tucker,
Georgia OPINION FILED: JULY 29, 1980

AFFIRMED
MATHERNE, J.
EWELL, J.
SUMMERS, J.

This suit was commenced in the Chancery Court of Madison County on July 26, 1977, by Robert Terrazas, the petitioner-appellee. On that date, the appellee filed a petition seeking a writ of *ne exeat* and a petition for writ of habeas corpus against Tommy Joe Riggs and Ann Marie Riggs, the defendants-appellants. Terrazas alleged that he was the natural father of an infant boy, Joseph Ryan Riggs, who had been adopted by the appellants in Georgia. Terrazas further alleged that the appellants were unlawfully detaining the minor child and that he was entitled to the possession and custody of the minor child.

Terrazas prayed that the writ of *ne exeat* be issued to keep the appellants from leaving this jurisdiction until the matter was settled. Terrazas prayed in the writ of habeas corpus that the court grant the custody of the child to him. Both writs were issued the day they were sought.

A hearing was held before the chancellor on August 7, 8, and 9, 1979. His opinion was released on September 21, 1979, finding that Terrazas should be awarded custody of the minor child and that pending further hearings and appeals, the minor child should be placed in the protective custody of the Tennessee Department of Human Services.

The appellants perfected an appeal to this court, which in turn entered a stay order which provided that the minor child remain with the appellants pending the appeal to this court on its merits.

The appellants have presented seven issues for review by this court:

1. Did the Trial Court err in failing to give full faith and credit to the Georgia adoption order?

2. Did the Trial Court err in affording Plaintiff a legal status which was not justified in fact or in law?

3. Did the Trial Court err in conducting a hearing on extraneous matters when the only issue before the Court was the *habeas corpus* question of the legality of the Defendant's holding of the child?

4. Did the Trial Court err in rendering an opinion without affording Defendants an opportunity to file an answer?

5. Did the Trial Court err in rendering an opinion and judgment while Defendants had motions pending which had not been acted upon by the Court?

6. Did the Trial Court err in admitting into evidence certain depositions taken by Plaintiff without Defendants having been given adequate notice of the taking of said depositions?

7. Will the ruling of the Trial Court destroy the institution of adoption?

In the fall of 1977, while he was in his final year of law school at Santa Clara University, Terrazas began dating Roneva Anderson, also a student at Santa Clara University, and they contemplated marriage. In May, 1978, Miss Anderson became preg-

nant and considered surrendering the child for adoption. However, Terrazas made it known to Miss Anderson on several occasions that he was desirous of taking the child and raising it.

In the fall of 1978, Terrazas was unable to determine the whereabouts of Miss Anderson. After it became clear to Terrazas that Miss Anderson did not want to marry him, he retained legal counsel. On November 29, 1978, he filed a petition under the Uniform Parentage Act of California seeking to establish a parent-child relationship with his unborn child. Numerous efforts were made to serve the mother with legal process in California. She was finally located and served on February 25, 1979. Unbeknownst to Terrazas, a petition for adoption had already been filed in Georgia by Mr. and Mrs. Riggs. Also during this time, Terrazas contacted several adoption agencies in an attempt to prevent the feared adoption of his child.

After breaking off her relationship with Terrazas, Miss Anderson counseled with Father Joseph Ryan, a Catholic priest, who introduced her to a Sister Julianna, resident of a Catholic convent in Reno, Nevada. Arrangements were made for Miss Anderson to live in Reno at the convent until her baby was born.

In December, 1978, Father Ryan telephoned Mr. and Mrs. Riggs in Georgia about the possibility of adopting the child who was soon to be born to Miss Anderson. On December 18, 1978, Mr. and Mrs. Riggs sent a check to Father Ryan for $2,000.00 to cover the perinatal expenses incurred by Miss An-

derson. Later Mr. and Mrs. Riggs also paid the plane fare for Sister Julianna to transport the baby from Reno, Nevada, to Georgia.

Early in January, 1979, Terrazas contacted Father Ryan, who refused to reveal Miss Anderson's whereabouts although he was at the time arranging for the adoption of the unborn child. In fact, he told Terrazas he knew nothing about the matter.

Miss Anderson's baby was born on January 29, 1979. Masquerading as Jessica Stewart, she signed a release, surrender and affidavit denying any knowledge of the name and whereabouts of the child's biological father. As Jessica Stewart she also signed the child's birth certificate. Three days after the child was born, he was delivered to Mr. and Mrs. Riggs in Georgia by Sister Julianna.

On February 7, 1979, Mr. and Mrs. Riggs filed a petition for adoption in the Superior Court of Colquitt County, Georgia. The false affidavits of Miss Anderson, using the assumed name of Jessica Stewart, were attached to the petition. On March 1, 1979, a hearing was held in the Georgia court, and the natural father's rights to the child were terminated. The only evidence before the court on that date as to the father's identity was the false affidavit of the mother. The evidence showed that there was no attempt to verify the identity of the natural father. The Department of Human Resources of Georgia made a visit to the home of the defendants on March 7, 1979. Early in March, that same agency made its only contact with the mother, by telephone, whereupon the mother informed the social worker that she

did not know the identity of the father.

Very soon after the parental rights of Terrazas were terminated in Georgia, Mr. Riggs found employment in Tennessee, and on March 17, 1979, signed an agreement to purchase a house in Jackson, Tennessee. The final hearing on the adoption was held in Georgia on April 12, 1979, and on the next day the appellants moved from Georgia to Tennessee.

After Miss Anderson was served with the California suit instigated by Terrazas, she denied having a baby, and a continuance was sought by her attorney for a medical examination. When the matter was finally heard in the California court on April 30, 1979, Terrazas was found to be the father of the minor child. As a result of this finding, the California court issued a restraining order against any placement of the child for adoption. It was at that hearing that Terrazas was informed that Miss Anderson had given birth to his son in Nevada, listing her name as Jessica Stewart, and that the child had been adopted by Mr. and Mrs. Riggs in Georgia. Terrazas then had the minor child's birth certificate changed in Nevada to reflect the name of Joseph Robert Terrazas.

Terrazas then retained counsel in Georgia and filed an action to determine whether an adoption had taken place. The action was initially begun in Atlanta, and upon Terrazas' learning that the adoption proceedings had occurred in Colquitt County, Georgia, proceedings were commenced there. After proceedings were commenced in Colquitt County, it

was learned that Mr. and Mrs. Riggs had moved to Madison County, Tennessee.

In April of 1979, Mr. and Mrs. Riggs learned of the California suit which had been instituted by Terrazas. Mr. and Mrs. Riggs took no action in this matter until they were served with the papers in this suit, which was commenced in Madison County, Tennessee.

The appellants rely heavily on the Tennessee Supreme Court case of *Abernathy v. Chambers*, 482 S.W. 2d 129 (1972), as authority for the principle that the full faith and credit clause requires the Tennessee courts to accord res judicata effect to a final decree rendered by another state. We find, however, that in the *Abernathy* case the Tennessee Supreme Court first looked to the issue of whether the foreign (Mississippi) state court had jurisdiction. Before affording the foreign sister state judgment full faith and credit, the Tennessee Supreme Court determined that all essential parties to the Mississippi proceeding were, in fact, before the Mississippi court. *Abernathy* held that the Tennessee court was at liberty to see if questions of jurisdiction had been fully and fairly litigated, and finally decided, in the court which rendered the original judgment.

In a 1942 case, *McAlhany v. Allen*, 23 S.E. 2d 676, 680 (1942), the Georgia Supreme Court refused to recognize a Tennessee adoption after finding a fatal infirmity in the Tennessee proceedings. In *McAlhany*, the Georgia court said:

[T]he Full Faith and Credit Clause of the Federal

> Constitution would not require that such decree of adoption be given effect in this state as against the father, where he was not made a party in the adoption case, and was not served, and did not appear and plead, or otherwise waive service, or consent to such adoption. . . .

We are not persuaded that Tennessee has no choice but to give full faith and credit to the order in Georgia granting adoption unless this court can find that the Georgia judgment was vitiated by a manifest fraud. We agree with the appellants that a final judgment in a sister state is ordinarily conclusive upon the merits in every other state, and we applaud the principal of comity; however, we are not obliged to give full faith and credit to any judgment of a state which we hold to be violative of Tennessee's public policy or the Federal Constitution. *Hanson v. Denckla*, 357 U.S. 235 (1958), *reh. denied* 358 U.S. 858 (1958). We look here to see if there were such failures of jurisdiction and/or due process of laws in Georgia as to bring us within the rule enunciated by the United States Supreme Court in the landmark case of *Williams v. State of North Carolina*, 325 U.S. 226 (1945), or *Hanson, supra.* These are threshold questions. We, therefore, do not need to look into the issue of whether such fraud was perpetrated by the mother on the Georgia court as to vitiate the Georgia judgment.

In *Williams v. State of North Carolina, supra*, the United States Supreme Court stated:

> It is one thing to reopen an issue that has been settled after appropriate opportunity to present

> their contentions has been afforded to all who had an interest in its adjudication. This applies also to jurisdictional questions. After a contest these cannot be relitigated as between the parties. . . But those not parties to a litigation ought not to be foreclosed by the interested actions of others, especially not a State which is concerned with the vindication of its own social policy and has no means, certainly no effective means, to protect that interest against selfish action of those outside its borders. . . .

Williams v. State of North Carolina held that a judgment rendered by a court in one state can be made a judgment in another state only if the court rendering the original judgment had jurisdiction to render it, and that a state decree of divorce may be collaterally impeached in another state for want of jurisdiction even though the record purports to show jurisdiction.

In the instant case the appellee did not have notice of the Georgia proceedings of adoption and was not before that court. The mother of the child, Roneva Anderson, evidently did everything she could to keep the appellee from his child and to deny him an opportunity to be heard in Georgia. She was aided and abetted in this by Father Ryan, a friend of the appellants who had the child delivered to them for adoption.

In litigation between parties over private rights, it is well-settled that due process of laws requires that both notice and an opportunity to be heard be given to necessary parties as to the essentials of a

judicial proceeding. Notice and opportunity to be heard are the minimal requirements of due process. *Mary W. Graves et al v. David A. Witherspoon*, 379 F. Supp. 52 (E. D. Tenn., 1974); see also *In Re Adoption of Malpica-Orsini*, 331 N.E. 2d 486 (N.Y. (1975).

Let us assume, *arguendo*, that the appellee Terrazas had been married to the birth mother. If so, for this court to give full faith and credit to the Georgia adoption decree, rendered without the Georgia court's having in personam jurisdiction over Mr. Terrazas, would unquestionably deprive the married father of due process of laws. Before the Georgia court could condemn a *married* father to losing his child, that court must afford him an opportunity to contest the propriety of the legal action taken against him. Such is the Constitutional guaranty applied to the states by the Fourteenth Amendment.

But the appellee Terrazas was not married to the birth mother, Roneva Anderson. The appellants call Mr. Terrazas the mere "sperm impregnator" of the birth mother. The record convinces this court that the appellee was, at the very least, the natural father of the baby whose custody is in question here.

The issue becomes, then, whether the appellee, the natural father, had established such a relationship with his natural minor child as to entitle him to due process of laws — specifically, notice and an opportunity to be heard — before his parental rights, if any, could be terminated by any court. If we find that the appellee had achieved a status entitling him to due process of laws in the Georgia adoption proceeding, then we cannot give full faith and credit

to the Georgia decree of adoption. *See In re: Adoption of McElroy*, 522 S.W. 2d 345 (Tenn. 1975), *cert. denied* 423 U.S. 1024 (1975); *McAlhany v. Allen, supra; Hanson v. Denckla, supra.*

The appellants argue that the chancellor below erred in affording the appellee a legal status which was not justified in fact or in law. The appellants argue that the putative father was nothing more in Georgia than the male whose sperm had impregnated the mother of Joseph Ryan Riggs, and that this type of putative father was not an essential party in the Georgia adoption proceedings who, as such, had to be served with process.

Implicit in the appellants' argument is the theory that if the appellant is a married father — or possibly an unmarried father who has established a familial relationship with the child — he was entitled, in the Georgia court, to notice comporting with the Due Process of Laws Clause of the Federal Constitution; whereas if the appellee is only an unmarried father — or an unmarried father who has not established a familial relationship with the child — he does not come within the constitutional guaranty. The appellants would have us ignore the reasons why the appellee did not establish familial ties with the minor child.

The appellants' contentions lead us now to *Stanley v. Illinois*, 405 U.S. 645 (1972), a landmark case dealing with the rights of fathers of illegitimate children to notice and an opportunity to be heard; and we note that the marked trend of the law is to favor these rights.

In *Stanley* the United States Supreme Court labeled the right to raise one's children as a basic civil right of man. The *Stanley* court further said "it is cardinal with us that the custody, care and nurture of the child reside first with the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."

Unmarried, Stanley had lived with the mother of his three children, along with the children, for a number of years. When the mother died, the children were declared wards of the state and placed with court-appointed guardians. Under Illinois law, *married fathers* and unwed mothers could not be deprived of their children absent a showing of unfitness. The Illinois Supreme Court said that the actual fitness of Stanley, as an *unwed* father, was irrelevant and that he could be separated from his children upon mere proof that he and the mother had not married. Stanley claimed that he had been deprived of equal protection of the laws guaranteed him by the Fourteenth Amendment. On appeal, the United States Supreme Court concluded that all Illinois parents are constitutionally entitled to a hearing on their fitness before their children are removed from their custody; therefore, when Stanley was not granted such a hearing, he was denied equal protection under the laws. The *Stanley* court further stated: "To say that the test of equal protection should be the 'legal' rather than the biological relationship is to avoid the issue. For the Equal Protection Clause necessarily limits the authority of a State to draw such 'legal' lines as it chooses." A parent's interest in his or her children must be protected absent a countervailing interest.

In *Quilloin v. Walcott*, 434 U.S. 246 (1978), *reh. denied* 435 U.S. 918 (1978), the plaintiff attacked the Georgia adoption statutes as being violative of the Equal Protection Clause of the Fourteenth Amendment because they were discriminatory in treatment of putative fathers. *Quilloin* was to be appealed to the United States Supreme Court solely on the disparate statutory treatment of a married father and an illegitimate father. The appellant was the father of an illegitimate child whose adoption was sought by the mother's husband. The child had been in the custody and care of the mother for his entire life. The appellant tried to block the adoption of the child, but he did not seek custody of his child. *Quilloin* was not a case in which the natural father at any time had, or sought, actual or legal custody of the child. At the hearing at the lower court, the appellant was not found to be an unfit parent, but the adoption was granted over his objections.

Under Georgia law a child born *in wedlock* cannot be adopted without the consent of each living parent if the parent has not voluntarily surrendered the rights to his child or been adjudicated unfit. *Outside wedlock*, only the consent of the mother is required for the adoption of an illegitimate child. If the father legitimates the child, either by marrying the mother and acknowledging the child as his own or by obtaining a court order declaring the child to be legitimate and capable of inheriting from him, he also may veto an adoption of his child.

On appeal to the Supreme Court of Georgia, the *Quilloin* appellant claimed that the applicable Georgia statutes violated the Equal Protection and Due

Process clauses of the Fourteenth Amendment and contended that he should have the same rights as a married or divorced parent. The Georgia Supreme Court upheld the lower court, relying on a strong state policy of rearing children in a family setting and on the fact that the appellant had not taken steps to support or legitimate the child over a period of more than 11 years.

The *Quilloin* appellant then appealed to the United States Supreme Court, and his equal protection claim was based solely on the different statutory treatment of unmarried fathers and married fathers. The father did not claim that he was deprived of a right to a hearing nor did he challenge the sufficiency of the notice.

The Georgia court had grounded its decision on the best interest of the child. The United States Supreme Court examined this issue under the Due Process Clause, then under the Equal Protection Clause, and said:

> We have little doubt that the Due Process Clause would be offended "[i]f a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest." *Smith v. Organization of Foster Families*, 431 U.S. 816, 862-863, 53 L. Ed. 2d 14, 97 S. Ct. 2094 (1977) (Stewart, J., concurring in judgment). *But this is not a case in which the unwed father at any time had, or sought, actual or legal custody of his child. . . .*

. . . We think appellant's interests are readily distinguishable from those of a separated or divorced father, and accordingly believe that the State could permissibly give appellant less veto authority than it provides to a married father.

Although appellant was subject, for the years prior to these proceedings, to essentially the same child support obligation as a married father would have had, compare § 74-202 with § 74-105 and § 30-301, he has never exercised actual or legal custody over his child, and thus has never shouldered any significant responsibility with respect to the daily supervision, education, protection, or care of the child. Appellant does not complain of his exemption from these responsibilities and, indeed, he does not even now seek custody of his child. In contrast, legal custody of children is, of course, a central aspect of the marital relationship, and even a father whose marriage has broken apart will have borne full responsibility for rearing of his children during the period of the marriage. *Under any standard of review, the State was not foreclosed from recognizing this difference in the extent of commitment to the welfare of the child.*

For these reasons, we conclude that §§ 74-203 and 74-403(3), as applied in this case, did not deprive appellant of his asserted rights under the Due Process and Equal Protection Clauses. The judgment of the Supreme Court of Georgia is, accordingly, affirmed. *Quilloin, supra,* at 520. (Emphasis added)

In *Quilloin, supra,* the father knew where his child

was and could have supported or legitimated his child, but he did not choose to do so. In the case at bar, the father has gone to great lengths to locate and to gain custody of his child. The appellee has sought to exert full responsibility for his child. Although it is true, as the appellants allege, that the putative father and the child here have had a lack of relationship, we find that any lack of relationship is not through the fault of the father. The putative father made obvious efforts to establish a *de facto* and *de jure* relationship with the child.

We look here to the extent of the appellee's commitment to the welfare of his child, and find it considerable. *See In re: Adoption of McElroy, supra.* In an age of permissive sex and fleeting relationships, the appellee's long quest to assume responsibility for his child is impressive indeed.

Quilloin, supra, cannot be relied upon as a basis for overturning the chancellor, as the pivotal issue there was not the sufficiency of notice to the unmarried parent under the Georgia statutes. *Quilloin* recognized that an unwed father was entitled to due process safeguards before his parental rights could be terminated. Notice is one of the most basic due process safeguards.

In the instant case, the appellee has established, through his sperm and through his efforts to find his natural child, such a relationship with the child as to entitle him to due process of laws in any proceeding adverse to his parental rights. No court could have constitutionally deprived this father of his child without giving him notice. And when third

parties, appellants here, seek custody of the appellee's child, no court could constitutionally deprive the appellee of his child absent the showing of a strong countervailing interest.

The appellants cite *Caban v. Mohammed*, — U.S. —, 99 S. Ct. 1760 (1979), which held unconstitutional, as gender-discriminatory, a part of a New York statute. The New York statute granted an unwed mother the right of absolute veto over a proposed adoption. The same New York statute made the unmarried father's consent irrelevant. This part of the statute was held to be in violation of the Equal Protection Clause of the Fourteenth Amendment. The United States Supreme Court stated that "in these circumstances where the father has never come forward to participate in the rearing of his child, nothing in the Equal Protection Clause precludes the state from withholding from him the privilege of vetoing the adoption of that child." *Ibid*, at p. 1768.

We think that the appellee has come forward to participate in the rearing of his child within the meaning of the *Caban* guidelines. This means that in the Georgia court he should have been allowed the privilege of vetoing his child's adoption. Instead, he received no notice at all of the adoption proceedings.

The appellants contend that we cannot apply the guidelines set out in *Caban* to the case at bar because *Caban* cannot be retroactively applied. We disagree. *Caban* does not overrule clear past precedent on which litigants may have relied, nor does it decide an issue of first impression whose resolution was not clearly foreshadowed. In determining whether *Ca-*

ban can be retroactively applied, this court has followed the test of the United States Supreme Court and weighed the merits and demerits in this "case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." *Linkletter v. Walker*, 381 U.S. 618 (1965); *Chevron Oil Company v. Huson*, 404 U.S. 97, 107 (1971).

As to this retroactivity issue, we go further and state that we have not found it necessary to fit the appellee within the *Caban* guidelines. We believe that the appellee amply meets the tests of *de facto* fatherhood as set out in *Stanley, supra*, and *Quilloin, supra.*

The appellee was entitled to minimal due process of laws before his natural child could be adopted by the appellants. This court will not deprive such a parent of the parent-child relationship, one of the most basic of civil rights, without affording that parent adequate notice and an opportunity to be heard.

In the Georgia adoption proceedings under which the appellants claim their rights to the child, the father had no notice and no right of hearing before his parental rights were terminated. There can be no valid adoption without a valid termination of parental rights. *State ex rel. Lewis v. Lutheran Social Services of Wisconsin & Upper Michigan*, 207 N.W. 2d 826 (1973). The interest of a father in his child is of profound importance, deserving protection. This state has a strong interest in sustaining the father-child relationship and protecting the family unit.

For this court to enforce the Georgia judgment, which is fraught with constitutional difficulties, and to deny the natural father due process of laws, would be repugnant to the Federal Constitution and the public policy of Tennessee. We do not afford full faith and credit to the Georgia decree under which the appellants claim custody of the child, and said decree is hereby rendered nugatory. We hold that the appellee is the birth father, the *de facto* father, and the *de jure* father of the minor child. Because the Georgia adoption decree is invalid, and because of the natural father's parental status, the chancellor below correctly ruled that a writ of habeas corpus would lie in favor of the appellee.

In response to the appellants' contention that sustaining the trial court will destroy the institution of adoption, we must note that *Williams v. State of North Carolina, supra,* did not curtail the institution of divorce.

We shall not examine the issues of whether the chancellor below erred in: (1) conducting a hearing on matters extraneous to the habeas corpus proceedings; (2) rendering an opinion without affording the defendants-appellants an opportunity to answer; and/or (3) rendering an opinion while defendants had motions pending. It is enough to hold that the chancellor correctly granted the writ of habeas corpus. The rights of the minor child were fully protected at the habeas corpus proceeding, and the chancellor's decision not to appoint a guardian ad litem was proper and within his sound discretion. *Gann v. Burton,* 511 S.W. 2d 244 (Tenn. 1974).

The appellants contend that the trial judge erred at the habeas corpus hearing in admitting into evidence the out-of-state deposition of the birth mother, Roneva Anderson. The entire record of the proceeding conducted in Calaveras County, California, which included the deposition of Roneva Anderson and the judgment of that court adjudicating Terrazas to be the father of the minor child, was properly admitted into evidence in the trial court of Madison County, Tennessee, the entire record having been properly authenticated pursuant to Rule 44 of the *Tennessee Rules of Civil Procedure.* Therefore, we must give full faith and credit to the California proceedings establishing Terrazas to be the natural father of the minor child.

For the reasons stated, and under the authorities cited, we respectfully overrule all issues presented by the appellants for our review.

We affirm the chancellor's issuance of the writ of habeas corpus. Custody of the minor child is awarded to the appellee, Robert Terrazas. Pending time for appeal all parties are enjoined from removing the minor child from this jurisdiction.

The birth certificate of the minor child shall be amended in order to reflect the child's new name, as chosen by the appellee.

The costs of this appeal are taxed against the appellants, for which execution may issue if necessary.

SUMMERS, J.

CONCUR:
MATHERNE, J.
EWELL, J.

IN THE COURT OF APPEALS OF TENNESSEE
WESTERN SECTION AT JACKSON

IN RE: JOSEPH RYAN RIGGS, A Minor, ROBERT TERRAZAS *Petitioner-Appellee* *VS.* TOMMY JOE RIGS and ANN MARIE RIGGS *Defendants-Appellants*	FROM THE CHANCERY COURT OF MADISON COUNTY AT JACKSON HONORABLE JOE C. MORRIS CHANCELLOR

JUDGMENT

This matter came on to be regularly considered by this court on the record. For the reasons set forth in our opinion of even date, it is ordered:

1. That the judgment of the chancellor's issuance of the writ of habeas corpus is affirmed.

2. Custody of the minor child is awarded to the appellee, Robert Terrazas.

3. Pending time for appeal all parties are enjoined from removing the minor child from the jurisdiction of the court.

4. That the costs of this cause are taxed against the appellants, for which execution may issue if necessary.

ENTER: JULY 29, 1980

SUMMERS, J.

APPENDIX C

IN THE SUPREME COURT OF TENNESSEE
AT JACKSON

IN RE: JOSEPH RYAN RIGGS, A Minor, ROBERT TERRAZAS, *Appellee* *VS.* TOMMY JOE RIGGS, and ANN MARIE RIGGS, *Appellants*	MADISON EQUITY

ORDER

On considering the application for permission to appeal and briefs filed in this case and the entire record, the application of Tommy Joe Riggs, and Ann Marie Riggs is denied at cost of the appellants.

PER CURIAM

FILED
OCTOBER 6, 1980
JEWEL REDDEN, CLERK

APPENDIX D

Georgia Code Chapter 74

Adoption

Act No. 85, Georgia Laws 1977, Effective January 1, 1978

Section 74-404(c)(5).

Whenever the biological mother surrenders her parental rights she shall execute an affidavit as to the identity and location of the putative father in substantially the following form:

MOTHER'S AFFIDAVIT REGARDING PUTATIVE FATHER

NOTICE TO MOTHER:

This is an important legal document which deals with your child's right to have its biological father's rights properly terminated. You have the right not to disclose the name and address of the father of your child. Understand that you are providing this affidavit under oath and that the information provided will be held in strict confidence and will be used only in connection with the adoption of your child.

Personally appeared before me, the undersigned officer duly authorized to administer oaths, _____ _____, who, after having been sworn, deposes and says as follows:

That I am the mother of a (male) (female) minor child born _____.

That the name of the biological father of my child is _____, and his last known address is _____.

_____.

Sworn to and subscribed
before me this _____
day of _____, _____.

_____
Notary Public.

Section 74-406. Notice to Putative Father.

(a) If the identity and location of the putative father of an illegitimate or legitimate child is known or reasonably ascertainable and he has not executed a surrender as provided in Code section 74-404(c), then he shall be notified of the mother's surrender or her consent to the child's adoption by her husband, or the proceeding to terminate her parental rights by registered or certified mail, return receipt requested, at his last known address.

(b) If the identity and location, or either, of the putative father of an illegitimate or legitimate child is not known or reasonably ascertainable then upon motion by either the petitioner(s), Department of Human Resources, or licensed child-placing agency the Court, as soon as practicable, shall make such inquiry as it deems appropriate under the circum-

stances and shall determine whether the identity and location of the putative father is ascertainable, and whether the putative father lived with the child, contributed to its support, or has given any other tangible indication of interest in the child, so as to entitle him to notice of the mother's surrender or her consent to the child's adoption by her husband, or the proceeding to terminate. If the Court identifies the putative father and determines that he is entitled to notice of the mother's surrender or the proceeding to terminate her parental rights it shall enter an appropriate order designed to afford him such notice. If after inquiry the Court is unable to identify the putative father or concludes that he is not entitled to notice of the mother's surrender or her consent to the child's adoption by her husband, or the proceeding to terminate her parental rights the Court shall enter an order terminating the putative father's rights with reference to the child.

(c) When notice is to be given pursuant to subsection (a) or (b) above, it shall advise the putative father that he loses all rights to the child and will neither receive notice nor be entitled to object to the adoption of the child unless he files (1) a petition to legitimate the child pursuant to Code section 74-103, and (2) notice of such petition to legitimate with the court in which the adoption is pending, within thirty (30) days of receipt of such notice.

(d) If a legitimation petition is not filed by the putative father and notice given as required in subsection (c) above within thirty (30) days of his receipt of notice, as provided for in subsection (a) or (b) above, or if after filing such petition, he fails to

prosecute it to final judgment he loses all rights to the child and he may not thereafter object to the adoption and is not entitled to receive notice of the adoption.

(e) If the child is legitimated by the putative father, the adoption shall not be permitted except as provided in Code Sections 74-403 through 405.

Section 74-409. Investigation by Department of Human Resources Or Other Agency.

(a) Prior to the date set by the court for a hearing on the petition for adoption, it shall be the duty of the Department of Human Resources through its own agents, one of its licensed child-placing agencies or through any other agency appointed by the Department of Human Resources, to verify the allegations in the petition for adoption and to make a complete and thorough investigation of the entire matter, and to report its findings and recommendations in writing to the court where the petition for adoption was filed. If for any reason the Department of Human Resources shall find itself unable to make or arrange for the proper investigation and report, it shall be the duty of the Commissioner of the Department to notify the court immediately, or at least within twenty (20) days after receipt of the request for investigation service, that it is unable to make such report and investigation so that the court may take such other steps as in its discretion are necessary to have the entire matter investigated.

Section 74-410. Report and Recommendation.

(a) The report and findings of the investigating

agency shall, among other things, include the following:

(1) Verification of allegations contained in the petition.

(2) Circumstances under which the child came to be placed for adoption.

(3) Whether the proposed adoptive parent(s) is financially (including adoption supplement if approved by the Department of Human Resources), physically and mentally able to have the permanent custody of the child.

(4) The physical and mental condition of the child to be adopted insofar as this can be determined by the aid of competent medical authority.

(5) Whether or not the adoption is for the best interests of the child, including general care.

(6) Suitability of the home to the child.

(7) Whether the identity and location of a putative father is known, or ascertainable and whether the requirements of Code section 74-406 were complied with, if applicable.

(8) Any other information that might be disclosed by the investigation that would be of any value or interest to the court in deciding the case.

Section 74-412. Hearing and Decree of Adoption.

(a) (1) Upon the date appointed by the court for

a hearing of the petition for adoption, or as soon thereafter as the matter may be reached for a hearing, the court shall proceed to a full hearing on the petition and the examination of the parties at interest in chambers, under oath, with the right of continuing the hearing and examinations from time to time as the nature of the case may require. The court at such times shall give consideration to the investigation report to the court provided for in Code section 74-409 and the recommendations therein contained.

(2) If the court determines from the report or otherwise that the identity and location of the putative father of an illegitimate or legitimate child have been ascertained or are ascertainable and that he is entitled to notice as provided in Code section 74-406 and has not received such notice, the court shall within five (5) days following such hearing cause the notice requirement of Code section 74-406 to be satisfied. The hearing shall be continued for at least thirty (30) days following notice to the putative father to allow him to legitimate the child or to surrender all his rights to said child. If the putative father files a petition to legitimate the child within such thirty-day period, the court shall fix a time for a hearing thereon which shall not be later than thirty (30) days from the date of filing of said petition. If a petition to legitimate the child is not filed within thirty (30) days following receipt of notice, or if the petition is not prosecuted to final judgment, such failure shall constitute the surrender by the putative father of all his rights to said child as provided in Code section 74-406(d) and the court shall proceed with the final hearing on the petition for adoption.

If the child is legitimated by the putative father, the adoption shall not be permitted except as provided in Code sections 74-403 through 405.

(b) If the court is satisfied that the parent(s) or guardian(s) of the child has been relieved of the care, support and guardianship and all rights to said child in the manner provided by law and that the petitioner(s) is capable of assuming responsibility for the care, supervision, training and education of the child, and that the child is suitable for adoption in a private family home and that the adoption requested is for the best interests of the child, it shall enter a decree of adoption, granting the permanent custody of the child to the petitioner(s), and declaring said child to be the adopted child of the petitioner(s).

(c) If the court shall determine that the petitioner(s) has not complied with the provisions of this Code Chapter, it may dismiss the petition for adoption without prejudice or continue the cause. Should the court find that any notice required under this Chapter to be given by the petitioner has not been given or not properly given, or that said petition has not been properly filed, then said court is authorized to enter an order providing for corrective action and an additional hearing.

(d) If the court is not satisfied that the adoption is for the best interests of the child, it shall deny the petition and commit the child to the custody of the Department of Human Resources or a licensed child-placing agency, if the petition was filed pursuant to subsection (1) or (2) of Code section 74-403(a). If

the petition was filed pursuant to subsection (3) or (4) of Code section 74-403(a), the child shall remain in the custody of the petitioner(s) if he is fit to have custody or the court may place the child with the Department of Human Resources for the purpose of determining whether or not a petition should be instituted under the Juvenile Court Code of Georgia.

Section 74-413. Effect of Decree of Adoption.

(a) A decree of adoption, whether issued by a court of this State or of any other jurisdiction shall have the following effect as to matters within the jurisdiction or before a court in this State:

(1) Except with respect to a spouse of the petitioner and relatives of the spouse, to relieve the natural parent(s) of the adopted individual of all parental rights and responsibilities, and to terminate all legal relationships between the adopted individual and his relatives, including his natural parent(s), so that the adopted individual thereafter is a stranger to his former relatives for all purposes including inheritance and the interpretation or construction of documents, statutes, and instruments, whether executed before or after the adoption is decreed, which do not expressly include the individual by name or by some designation not based on a parent and child or blood relationship; and

(2) To create the relationship of parent and child between petitioner(s) and the adopted individual, as if the adopted individual were a child of natural bodily issue of petitioner(s), and he shall enjoy every

right and privilege of a natural child of petitioner (2); and shall be deemed a natural child of petitioner(s) to inherit under the laws of descent and distribution in the absence of a will and to take under the provisions of any instrument of testamentary gift, bequest, devise or legacy, whether executed before or after the adoption is decreed, unless expressly excluded therefrom; and shall take by inheritance from relatives of the petitioner(s); and shall also take as a 'child' of the petitioner(s) under a class gift made by the will of a third person.

(b) Notwithstanding the provisions of subsection (a), if a parent of a child dies without the relationship of parent and child having been previously terminated the child's right of inheritance from or through the deceased is unaffected by the adoption.

80-1091

No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

IN RE: JOSEPH RYAN RIGGS (TERRAZAS),
A Minor
TOMMY JOE RIGGS
and ANN MARIE RIGGS,
Petitioners,

versus

ROBERT TERRAZAS,
Respondent.

ON WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF TENNESSEE,
WESTERN SECTION

RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether any of the questions presented by the Petition raise significant enough issues to justify granting a Petition for Certiorari.

2. Whether the Court of Appeals of Tennessee erred in refusing to give full faith and credit to a Georgia order of adoption.

3. Whether the Court of Appeals of Tennessee erred in their ruling that the father of the child had such a relationship with the child as to entitle him to due process of law, and if so, whether he received such due process in the Georgia adoption proceeding.

4. Whether Petitioners may raise the issue of the constitutional right of privacy of the mother of the child when that issue was not raised below, and if so, whether there was a failure of the Court of Appeals of Tennessee to recognize

such constitutional right.

5. Whether the Court of Appeals of Tennessee applied Caban v. Mohammed, 441 U.S. 380 (1979) to the instant case, and if so, whether such retroactive application was in error.

6. Whether the Court of Appeals of Tennessee denied the Petitioners their constitutional rights when it ordered the removal of the minor child from their custody.

7. Whether the Court of Appeals of Tennessee denied the minor child his due process rights when it refused to appoint a guardian ad litem.

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ON WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF TENNESSEE,
WESTERN SECTION

Respondent ROBERT TERRAZAS respectfully prays that Petitioners' Petition for Writ of Certiorari to review the decision of the Court of Appeals of Tennessee, Western Section, be denied.

OPINIONS BELOW

The opinions below are set forth in Appendices A - C of the Petition for Writ of Certiorari.

All references herein to those opinions shall be to the Appendix of said Petition.

STATEMENT OF THE CASE

"In the fall of 1977...Terrazas began dating Roneva Anderson...In May, 1978, Miss Anderson became pregnant and considered surrendering the child for adoption. However, Terrazas made it known to Miss Anderson on several occasions that he was desirous of taking the child and raising it." (Court of Appeal opinion, Appendix B of the Petition, pgs. 4a - 4b, hereinafter referred to as "opinion.")

"In the fall of 1978, Terrazas was unable to determine the whereabouts of Miss Anderson. After it became clear to Terrazas that Miss Anderson did not want to marry him, he retained legal counsel. On November 29, 1978, he filed a petition under the Uniform Parentage Act of California seeking to establish a parent-child relationship with his unborn child.

Numerous efforts were made to serve the mother with legal process in California. She was finally located and served on February 25, 1979. Unbeknownst to Terrazas, a petition for adoption had already been filed in Georgia by Mr. and Mrs. Riggs. Also during this time, Terrazas contacted several adoption agencies in an attempt to prevent the feared adoption of his child." (Opinion, page 4b, emphasis added).

Early in January, 1979, Terrazas contacted Father Ryan, who refused to reveal Miss Anderson's whereabouts, although he was at the time arranging for the adoption of the unborn child. In fact, he told Terrazas he knew nothing about the matter. (Opinion, pg. 5b, emphasis added).

Miss Anderson's baby was born on January 29, 1979. Masquerading as Jessica Stewart, she signed a release, surrender and affidavit denying any knowledge of the name

and whereabouts of the child's biological father. As Jessica Stewart she also signed the child's birth certificate. Three days after the child was born, he was delivered to Mr. and Mrs. Riggs in Georgia by Sister Julianna." (Opinion, page 5b, emphasis added).

"On February 7, 1979, Mr. and Mrs. Riggs filed a petition for adoption in the Superior Court of Colquitt County, Georgia. The false affidavits of Miss Anderson, using the assumed name of Jessica Stewart, were attached to the petition. On March 1, 1979, a hearing was held in the Georgia court, and the natural father's rights to the child were terminated. The only evidence before the court on that date as to the father's identity was the false affidavit of the mother. The evidence showed that there was no attempt to verify the identity of the natural father... Early in March, that same agency made its

only contact with the mother, by telephone, whereupon the mother informed the social worker that she did not know the identity of the father." (Opinion, pages 5b - 6b, emphasis added).

"...The final hearing on the adoption was held in Georgia on April 12, 1979, and on the next day the appellants moved from Georgia to Tennessee." (Opinion, p. 6b, emphasis added).

[Terrazas] did not have notice of the Georgia proceedings or adoption and was not before that Court. The mother... evidently did everything she could to keep [Terrazas] from his child and to deny him an opportunity to be heard in Georgia. She was aided and abetted in this by Father Ryan, a friend of [petitioners], who had the child delivered to them for adoption. (Opinion, page 9b).

"After Miss Anderson was served with

the California suit instigated by Terrazas, she denied having a baby, and a continuance was sought by her attorney for a medical examination. When the matter was finally heard in the California court on April 30, 1979, Terrazas was found to be the father of the minor child. As a result of this finding, the California court issued a restraining order against any placement of the child for adoption. It was at that hearing that Terrazas was informed that Miss Anderson had given birth to his son in Nevada, listing her name as Jessica Stewart, and that the child had been adopted by Mr. and Mrs. Riggs in Georgia. "Terrazas then had the minor child's Birth Certificate changed in Nevada to reflect the name of Joseph Robert Terrazas." (Opinion, p. 6b).

"...Terrazas then retained counsel in Georgia and filed an action to determine whether an adoption had taken place. The

action was initially begun in Atlanta, and upon Terrazas' learning that the adoption proceedings had occurred in Colquitt County, Georgia, proceedings were commenced there." (Opinion, page 6b)

"In April of 1979, Mr. and Mrs. Riggs learned of the California suit which had been instituted by Terrazas. Mr. and Mrs. Riggs took no action in this matter until they were served with the papers in this suit, which was commenced in Madison County, Tennessee." (Opinion, page 7b, emphasis added).

"This suit was commenced in the Chancery Court of Madison County on July 26, 1977 ...A hearing was held before the Chancellor on August 7, 8, and 9, 1979. His opinion was released on September 21, 1979... (Opinion, page 2b, emphasis added).

As the foregoing quotes from the Court of Appeal illustrate, the proceedings were initially begun before the child was born. The Petitioners herein first learned that

there was an action pending before the child was three months old. Papers were served on them in Tennessee before the child was six months old. The matter was tried when the child was barely six months old. The decision of the trial court granting custody to the father was made when the child was less than nine months old.

The only reason that the minor is still in the custody of the Petitioners is the fact that they chose to seek and obtain a stay of the trial court's order and then later a stay of the appellate court's order.

REASONS FOR DENYING THE WRIT

1. The Questions Presented by the Petition Do Not Raise Significant Enough Issues to Justify Granting Certiorari.

The facts of this case are unique. No case has been cited which is even remotely similar in factual background to the instant case.

The father's efforts in this case began before the birth of the child and continued for months after in four different states. The mother's actions were extremely unusual in her deceiving the father, her filing of false documents in three different states, and her lying under oath upon more than one occasion.

The adoption in question was an independent adoption, one where the child is placed directly with the adoptive parents, rather than through an adoption agency. In the instant case, a clergyman was the intermediary for the adoption, and he, too, lied to the natural father about the whereabouts of the child.

Thus, the factual background presented here is of an unusual and complicated nature, replete with countless twists to the central controversy. The path to a resolution can therefore not be drawn straight, but must provide detours designed to deal with these

factual idiocyncracies. For this reason, it follows that any decision rendered in this case could not set clear precedent for future cases of this kind, but would of necessity be mired down by numerous provisos applicable to the instant situation only. Certiorari is therefore not appropriate here.

2. The Georgia Decision was Not Entitled to Full Faith and Credit Because the Georgia Court Had No Jurisdiction.

Even were this Court to ignore the unique aspects of this case, the decision of the Tennessee Court of Appeals was completely sound. There is no contention that the father ever received notice of the pending adoption proceeding. No amount of argument or obfuscation can take away this fundamental fact.

It is a well-settled principle that a judgment of a sister state in which the court lacked jurisdiction over either a party or the subject matter of the suit is open to collateral attack and

cannot be saved by the full faith and credit clause of the United States Constitution. People of the State of New York, ex rel., Halvey v. Halvey, 330 U.S. 610, 614 (1947); Williams v. State of North Carolina, 325 U.S. 226 (1945); Milliken v. Meyer, 311 U.S. 451, 462 (1940), rehearing denied, 312 U.S. 712 (1941).

The above general principle was applied in an adoption context in the case of Armstrong v. Manzo, 380 U.S. 545 (1965). Therein the father was given no notice of a pending step-parent adoption. After the adoption, the father moved to set it aside, contending that the adoption decree was void because of a lack of notice to him. The U.S. Supreme Court stated:

> It is clear that failure to give the Petitioner notice of the pending adoption proceedings violated the most rudimentary demands of due process of law. (Armstrong, page 550).

The Tennessee Court of Appeals properly stated the issue as follows:

> The issue becomes, then, whether the Appellee, the natural father, had established such a relationship with his natural minor child as to entitle him to due process of law specifically, notice and an opportunity to be heard before his parental rights, if any, could be terminated by any court. (Petition, Appendix B, pg. 10b).

The Tennessee Court of Appeals relied upon the leading U.S. Supreme Court cases of Stanley v. Illinois, 405 U.S. 645 (1972), and Quilloin v. Walcott, 434 U.S. 246 (1978). Petitioners wish to limit Stanley to its facts, but ignore the broad constitutional principles enunciated in that case and set forth in the Tennessee Court of Appeals opinion, to wit, notice is required where a putative father has shown a tangible or significant interest in the child.

3. Respondent was Entitled to Notice as the Father of the Child and a Parent Who Demonstrated a Tangible Expression of Interest in the Child.

The rights of parents and their children to mutual association have long been considered as "fundamental", and as such, are rooted not only in natural law, but also in the First, Ninth and Fourteenth Amendments to the United States Constitution. This Court, in Stanley v. Illinois, 405 U.S. 645 (1972) noted:

> The Court has frequently emphasized the importance of the family. The rights to conceive and to raise one's children have been deemed 'essential' "basic civil rights of man", and "rights far more precious than property rights." It is cardinal with us that the custody, care and nurture of the child reside first with the parents, whose primary function and freedom include preparation for obligations the State can neither supply nor hinder." (405 U.S. at 651, emphasis added; citations omitted).

United States Supreme Court cases since Stanley display a continued sensitivity for the rights of the unwed father to the care and companionship of his own flesh and blood. Quilloin vs. Walcott,

434 U.S. 246 (1978); Caban vs. Mohammed, 441 U.S. 380 (1979).

In Quilloin, the unwed father of an eleven year old child was seeking to prevent the child's stepfather from adopting him. 434 U.S. at 247. The Court first examined the constitutionality of Georgia's adoption laws and then went on to hold that the adoption could proceed. Id. at 248.

Pivotal to the Court's decision were two factors which render the Quilloin situation crucially different from that presented in the case at bar: Firstly, the Court noted that:

> "This is not a case in which the unwed father at any time had, or sought, actual legal custody of his child." Id. at 255.

Having recognized that the father had never taken any steps to support or legitimize the child before the adoption petition was filed, the Court then pointed out that the father's constitutional

rights were not abridged as he had been given a full hearing when seeking to legitimize the child. Id. at 253.

As applied to the instant case, Quilloin stands for two basic propositions: (1) That an unwed father is entitled to the due process safeguards of notice and a hearing before his parental rights may be terminated, and (2) The Court will inquire as to whether the father has sought to support or legitimize his child before his parental rights may be justifiably terminated.

Because of the deceit of the mother, however, the father herein was prevented from living with his child or contributing to the child's support, although he displayed a strong desire to do both.

Assuming for the sake of argument that the deceit of the mother, her frustration of the father's efforts, and

what appears to be the complicity of the close friend of the Petitioners and intermediary for this adoption, Father Ryan, is not sufficient to give the father the right to notice and an opportunity to be heard, the question then becomes one of whether he has shown "a tangible expression of interest in the child."

A review of the facts amply demonstrates both the father's tangible efforts to locate the mother, live with and support his child, and to prepare himself for assuming the role of a parent. Since a comprehensive summary of these facts has already been included herein, they will not be reiterated here (See Statement of Case, pages 2 to 8, supra).

4. The Court of Appeals Did Not Fail to Recognize the Privacy Rights of the Mother.

The Petition states this issue as one of whether the Court of Appeals

erred in failing to recognize the constitutional right of privacy of the mother, who "refused to disclose the identity" of the father. There are a number of defects in Petitioners' argument. The first problem is that this issue has never been raised before. The opinion of the Court of Appeals which recorded the issues that were before that court, shows that this privacy issue was not among those presented [see Appendix B, pp. 2b-3b]. It is a well-settled rule that one cannot raise an issue on appeal which has never been raised below.

The next difficulty encountered is one of standing. The mother was not a named party to the proceedings in the Court below, nor did she appear in person or through counsel. Again, it is an issue of very basic constitutional law that, with certain exceptions not applicable here, one cannot raise the constitutional rights of another person not a party to the

proceeding.

The final problem with the Petitioners' position is that they simply misstate the facts. This is not a case of a mother who "refused to disclose the identity." The mother here did not choose to do so, but rather filed a false affidavit in which she swore she neither knew the identity nor the whereabouts of the natural father.

Even if the Petitioners were able to surmount this factual inaccuracy, and the other two obstacles just discussed, the argument should fail on its merits. Petitioners have not cited one case in support of their contention that the mother has a right to privacy which permits her to refuse to give the name of the natural father in a proceeding for the adoption of their child.

The case of Roe v. Norton, 422

U.S. 391 (1975) cited by Petitioners involved a Connecticut statute which required the mothers receiving aid to name the putative father, and made it a misdemeanor if the mother refused. The Supreme Court twice vacated the case and remanded it to the district court to consider the issue in light of further legislation. It is difficult to see where the Roe case stands for any proposition, let alone the broad statement attributed to it by Petitioners.

Also relied upon by Petitioners is the case of Roe v. Wade, 410 U.S. 113 (1973). The Roe case involved a married mother challenging Texas criminal abortion statutes. The Supreme Court discussed the constitutional right of privacy and noted that only such rights which are "fundamental" or "implicit in the concept of ordered liberty" are included and gave examples of the right of pro-

creation, the right of child rearing and education, and the right to marry (Roe v. Wade, supra, pgs. 152 - 153).

The final case relied upon by the Petitioners, Planned Parenthood of Missouri v. Danforth, 428 U.S. 52 (1975) involved another issue of abortion legislation. It is interesting to note that Justice Stewart in his concurring opinion said:

> "Previous decisions have recognized that a man's right to father children and enjoy the association of his offspring is a constitutionally protected freedom." (Planned Parenthood, supra, 428 U.S. at pg. 90).

5. The Tennessee Court of Appeals did Not Improperly Apply the Caban Case.

Petitioners argue that the Tennessee Appeals Court in some manner improperly retroactively applied the case of Caban v. Mohammed, 441 U.S. 380 (1979). First of all, the Tennessee appellate court expressly disclaimed relying on Caban when it stated:

> "As to this retroactivity issue, we go further and state that we have not found it necessary to fit the Appellee within the Caban guidelines. We believe that the Appellee amply meets the test of de facto fatherhood as set out in Stanley, supra, and Quilloin, supra (Petition, appendix B, pg. 18b).

Even if the Tennessee court had applied Caban, it would have been an appropriate use of retroactive application, as demonstrated by Petitioners' own authority, Chevron Oil Company v. Huson, 404 U.S. 97 (1971).

Chevron Oil set forth the three factors be considered when dealing with the issue of nonretroactivity. The first factor is whether a new principle of law has been established by either "overruling clear past precedent on which litigants may have relied...or by deciding an issue of first impression whose resolution was not clearly foreshadowed...". The Caban opinion neither overrules clear past

precedent nor was it an issue of first impression whose resolution was not clearly foreshadowed.

As to the second factor - i.e. "whether retroactive application will further or retard the operation of the rule", the Caban guidelines would certainly only advance the concept of due process to natural fathers first introduced in the Stanley v. Illinois, 405 U.S. 645 (1972), decision and further illuminated in Quillion v. Walcott, 434 U.S. 246 (1978).

As to the last factor - i.e., whether retroactive application of Caban could produce unequitable results, it should briefly be noted that the decision in that case was handed down very shortly after Petitioners had rushed their adoption through the Georgia courts and before the full three-day habeus corpus hearing was held in the Tennessee chancery court. Since the

Georgia court barely considered the father's rights (if at all), it is difficult to fathom how Caban could have affected the outcome there; furthermore, as Caban was already the law at the time of the Tennessee trial, all parties to that hearing were apprised that this opinion existed, thereby eliminating any element of surprise that could be claimed by the Petitioners. Due to this reason, and because Caban was thoroughly consistent with previous Supreme Court pronouncements in this area, even if the Tennessee tribunal had relied upon Caban in reaching its decision, the results achieved could be deemed neither unpredictable nor inequitable.

6. The Tennessee Court Acted In Full Recognition of Petitioners' Constitutional Rights.

Petitioners assert that the Tennessee Courts denied them "full recognition of their liberty rights and due process

rights under the Constitution of the United States" by refusing to honor the Georgia adoption decree and by granting custody of Joseph to his father.

It should be noted at the outset that Petitioners are now raising this issue for the first time; therefore, following the normal rules of appellate review, their present argument on this point is not properly within the Court's scope of review. Even if this issue were properly before the Court, the argument is without foundation.

Petitioners are purportedly basing their "fundamental rights and justifiable expectations" as the "legal" parents of Joseph upon the Georgia adoption decree. (see Petitioners' brief, pg. 27). However, for reasons previously stated, that decree is null and void and therefore cannot give rise to a legal claim of parentage (see Section 2, supra).

If Respondents claim that they acquired due process or liberty rights as attempted or purported adoptive parents, then Petitioners' own authority of Smith v. Organization of Foster Families, 431 U.S. 816 (1977) will put this claim to rest.

In Smith, this Court recognized that although children could develop ties with a family based upon an "intimacy of daily association", foster parents did not possess a "liberty interest" in the continued relationship with the children placed in their care (431 U.S. at 836; see also Petitioners brief, pg. 28). In addition, the concurring opinion in Smith squarely rejected this notion of the "psychological family" by stating that "...prolonged third party custody of children does not create some sort of 'squatter's rights'" (431 U.S. at 860, Justice Stewart concurring).

Petitioners next proceed to claim that the laws of Georgia presume that they would prevail in a custody dispute against a "third party", they being the purported parents. As support for this assertion, Petitioners cite Georgia Code §74-108, and Perkins v. Courson, 219 Ga. 611, 135 S.E. 2d 388 (1964). However, neither one of these authorities stands for the proposition stated; in fact, both further strengthen Respondent's right to the custody of his son.

Perkins v. Courson, supra, dealt with a natural father seeking custody of his son as against the maternal grandparents (the child's mother was deceased).

The Perkins Court analyzed the applicable statutes and case law dealing with this subject. It was pointed out that the only way to lose custody of one's natural minor child under Georgia law if no unfitness was shown, was by one of the means specified

in Georgia Code §74-108 (the statute cited by Petitioners, supra) - i.e., by: (1) Voluntary release to a third person; (2) Consent to adoption by a third person; (3) Failure to provide necessaries or abandonment; (4) Consent to the child's receiving the proceeds of his own labor; (5) Consent to marriage of the child, or, (6) Cruel treatment (emphasis added). (219 Ga. at 614, 135 S.E. 2d at 391).

None of these grounds could be applied to Respondent's actions, and indeed, Petitioners do not attempt to do so. What they do suggest, however, is that these criteria apply to them as persons attempting to adopt the child, and that Joseph should not be removed from their custody unless one of the above conditions is found. It must be noted, however, that Respondents could

cite no authority in support of this rather novel proposition.

Lastly, Petitioners contend that the trial court granted custody of Joseph to his father without having sufficient evidence as to his parental fitness. In this context, Respondent draws the Court's attention to specific findings of the Tennessee trial court:

> "This Court finds Plaintiff to be a fit, qualified, and suitable person to assume custody of his son." (Finding no. 9, pg. 7a of Appendix)
>
> "The Court finds that the Plaintiff is ready to assume full parental responsibilities. This conclusion is supported by the proof before the Court. The father has the personal ability to fulfill a child's need for support, affection, stimulation, guidance and restraint*** He would make a good father and a fine role model.***(Finding No. 12, pg. 8a).

In conclusion, therefore, neither of the courts below denied Petitioners any of their fundamental constitutional

rights by holding that Respondent, as the unqualifiedly fit parent of his minor son, was entitled to his custody.

7. It Was Not Necessary to Appoint a Guardian ad Litem Below.

We quote from the Tennessee Court of Appeal opinion, (Appendix to Petition for Certiorari, page 19b):

> "The rights of the minor child were fully protected at the habeas corpus proceeding, and the chancellor's decision not to appoint a guardian ad litem was proper and within his sound discretion."

Petitioners argue that somehow this decision of the Tennessee appellate court was in error; however, they fail to cite any case which even remotely stands for the proposition that a guardian ad litem must be appointed in custody disputes, let alone any case, as here, where the struggle is between those claiming to be the purported adoptive parents and the natural parent of the child.

Petitioners cite Wisconsin v. Yoder, 406 U.S. 205 (1972), which involved first amendment rights of freedom of speech, and the education of Amish children. The case of In Re Gault, 387 U.S. 1 (1967) cited by Petitioners, dealt with the rights of a juvenile in what amounts to a criminal proceeding. Petitioners also cite Parham v. J.R., 442 U.S. 584 (1979), a case involving the question of voluntary commitment of minors for mental illness treatment. That case, if it has any relevance at all to this matter, is a recognition that "...natural bonds of affection lead parents to act in the best interests of their children." (Parham, supra, pg. 602).

In addition, the Petitioners cite Rothstein v. Lutheran Social Services, 405 U.S. 1051 (1972). That case was a one-paragraph memorandum decision of the Supreme Court and it is difficult to see what guidance it can offer. Likewise, the

case of Smith v. Organization of Foster Families, 431 U.S. 816 (1977) cited by Petitioners, is of little help on the issue before the Court in the instant matter, as the quotation cited by Petitioners dealt with the issue of standing.

Petitioners also claim that it is "theoretically impossible for any child to ever claim the ear of a trial court" in these sort of matters "unless his interest can be protected and presented by a guardian ad litem." Constitutional procedural rights should not be predicated on theoretical possibilities, but rather should be founded on the realities of litigation. Approached in this fashion, it is clear that there is no merit to Petitioners' argument.

CONCLUSION

Petitioners, in their conclusion, argue that in some manner, the granting of custody to the father in this case is a

threat to the institution of adoption.

The instant case is not one of an innocent couple going to an agency seeking adoptive placement. Here, we have a direct or independent adoption where the potential adoptive parents chose to deal directly, through their agents, with the natural parents, except that they clearly failed to involve the natural father. They did not ask anything regarding the natural father, nor did they ask why the child was being put up for adoption. However, they did swear in the Georgia court, that "the natural father of the child is unknown."

As is discussed herein, Part 1, supra, the facts of this case are unique. If this case has any effect outside of the parties, it will be the beneficial one of possibly deterring the misfeasance, malfeasance and nonfeasance which is

evident throughout this case.

This matter has dragged on for over two years and across the continent. Every court that has ruled on the case has ruled in favor of the father. There is no reason, legal or equitable, for this Court to grant the Writ of Certiorari. It is time for this matter to come to an end and for the father to be united with his son. We respectfully ask that the Court deny the Petition for Certiorari.

Dated: January 27, 1981

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CERTIFICATE OF SERVICE

I hereby certify that, on the date shown below, a copy of the foregoing Response in Opposition to Petition for Writ of Certiorari of Tommy Joe Riggs and Ann Marie Riggs was mailed, first class, postage prepaid, to:

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Dated: January 30, 1981

NORDIN F. BLACKER

NORDIN F. BLACKER
Attorney for Respondent

I further hereby certify that 40 copies of the foregoing Response in Opposition to Petition for Writ of Certiorari of Tommy Joe Riggs and Ann Marie Riggs was mailed, first class, postage prepaid to the Clerk

of the Supreme Court of the United States, Supreme Court Building, Washington D.C. 20543.

Dated: January 30, 1981

NORDIN F. BLACKER

NORDIN F. BLACKER
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